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## Short Circuiting the Justice System: How Defendants Are Misusing Writs of Execution

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# Short Circuiting the Justice System: How Defendants Are Misusing Writs of Execution

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## I. INTRODUCTION

In electronics, a short circuit is “[a] low-resistance connection between two points in an electrical circuit, causing the current to bypass the rest of the circuit.”<sup>1</sup> Clever defendants in some states have found a way to achieve a similar effect in the civil justice system, bypassing litigation of their cases on the merits.<sup>2</sup> By obtaining a judgment against a plaintiff then executing on and purchasing the plaintiff’s claim, a defendant can “short circuit” the justice system and extinguish a lawsuit against itself, regardless of the merits.<sup>3</sup>

To illustrate the problem, suppose a plaintiff is injured when he is negligently struck by a delivery truck driver. Plaintiff sues both the driver and the driver’s employer, alleging damages of \$500,000, and has evidence of the driver’s negligence that makes success on the merits extremely likely. However, plaintiff is a judgment debtor—he owes \$50,000 to a third party from an unsatisfied judgment in a prior action. Defendants purchase the prior judgment from the third party for a small sum, buying the right to enforce that judgment against plaintiff and becoming the plaintiff’s judgment creditors.<sup>4</sup> To enforce the judgment they have just purchased, defendants obtain a writ of execution against plaintiff’s claims in the pending negligence lawsuit against defendants. Plaintiff’s claims—a form of property called a “chose in action”—are seized and sold at a sheriff’s auction. Defendants are the only bidders at the sale and purchase plaintiff’s claims for \$10,000. Defendants now own plaintiff’s right to pursue—or not pursue—the lawsuit.<sup>5</sup> They are, in effect, both plaintiffs *and* defendants, while the original plaintiff has been stripped of standing.<sup>6</sup> In their new capacity as plaintiffs, defendants move to dismiss the claims against themselves. Thus, defendants have extinguished the plaintiff’s \$500,000 claim for the comparatively small sum of \$10,000, without trying the case on the merits or negotiating a voluntary settlement. They have “bypass[ed] the rest of the circuit,” and plaintiff is forever barred from recovery on those claims.<sup>7</sup>

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1. AMERICAN HERITAGE COLLEGE DICTIONARY 1283 (4th ed. 2002).

2. *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1077 (10th Cir. 2009) (Lucero, J., concurring).

3. *See, e.g., id.* at 1071.

4. Defendants can obtain a judgment against the plaintiff in many ways. *See* *Citizens Nat’l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1007 (Miss. 2006) (judgment on a counterclaim); *RMA Ventures*, 576 F.3d at 1071 (judgment for attorney’s fees); *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 702–03 (Utah 2002) (judgment in a parallel proceeding); *Paglia v. Breskovich*, 522 P.2d 511, 515 (Wash. Ct. App. 1974) (purchase of a judgment from a third party).

5. *RMA Ventures*, 576 F.3d at 1075.

6. *See id.* (noting that by obtaining plaintiff’s cause of action, defendant deprived plaintiff of standing).

7. *See supra* note 1.

Cases of this nature are rare—there are about twenty-five cases in thirteen jurisdictions across the country—but the case law is relatively well developed in Washington and Utah.<sup>8</sup> Washington empowers courts to refuse to issue a writ of execution to prevent a judgment creditor from obtaining control of both sides of a lawsuit<sup>9</sup> if the “demands of justice to all parties can be reasonably satisfied.”<sup>10</sup> In contrast, Utah has adopted a bright-line rule that allows judgment creditors to execute on choses in action against themselves, but has carved out a limited public policy exception prohibiting lawyers from obtaining malpractice claims against themselves.<sup>11</sup> This Comment argues that Washington’s approach of allowing a trial court to exercise its discretion to refuse to issue a writ of execution is preferable to Utah’s bright-line rule. Washington’s approach is preferable because it allows a court to balance the interests of the parties and society to ensure a just result. In contrast, Utah’s approach ignores the legitimate interests of the judgment debtor and allows defendants to use a writ of execution, a mere procedural tool, as shield against liability—a purpose for which the writ of execution are not intended. After establishing the superiority of Washington’s approach, this Comment argues that it could be improved by adopting a four-factor balancing test to determine whether or not the writ should issue.

This Comment’s approach can be summarized as follows. Part II discusses the basic structure of the law surrounding execution and choses in action. Specifically, it outlines the nature of choses in action as property,<sup>12</sup> the law of execution,<sup>13</sup> execution on choses in action,<sup>14</sup> and constitutional rights associated with choses in action.<sup>15</sup> Part III describes cases in which a defendant judgment creditor has attempted to execute on choses in action against itself, focusing primarily on Washington and Utah’s approaches, but describing cases from other jurisdictions where appropriate. Part IV begins by establishing the superiority of a balancing test compared to the benefits of a bright-line rule that either allows or prohibits the tactic.<sup>16</sup> It then identifies

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8. See *infra* notes 129–33 and accompanying text.

9. *MP Med. Inc. v. Wegman*, 213 P.3d 931, 935–36 (Wash. Ct. App. 2009).

10. *Paglia v. Breskovich*, 522 P.2d 511, 513 (Wash. Ct. App. 1974).

11. *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 702–04 (Utah 2002).

12. See *infra* Part II.A.

13. See *infra* Part II.B.

14. See *infra* Part II.C.

15. See *infra* Part II.D.

16. See *infra* Part IV.A.

and analyzes the interests of the judgment debtor,<sup>17</sup> the judgment creditor,<sup>18</sup> and society,<sup>19</sup> with an eye toward illuminating how different courts have analyzed and valued those interests. Then it proposes a four-factor test that will properly balance the interests of all of the parties and ensure that courts may exercise their discretion to achieve a just result.<sup>20</sup> Part V.A returns to the hypothetical scenario described above to illustrate some of the potential negative consequences of Utah's unrestrained approach and how Washington's approach, coupled with this Comment's proposed four-factor test, can empower a court to issue a ruling that justly accommodates the interests of all of the parties involved. Finally, Part V.B briefly discusses potential barriers to implementation of the proposed solution.

## II. CHOSSES IN ACTION AND THE LAW OF EXECUTION

A plaintiff's claim is a form of personal property called a "chose in action" and was considered inalienable until the late nineteenth and early twentieth centuries.<sup>21</sup> A writ of execution is a court's written order to its officer to seize and sell property belonging to a judgment debtor, and then give the proceeds to the judgment creditor to satisfy the judgment.<sup>22</sup> Because choses in action were long considered inalienable, they were not subject to execution at common law.<sup>23</sup> Over time, as the common law's restriction on the alienation of choses in action eroded, most states passed statutes permitting a judgment creditor to reach choses in action to satisfy a judgment.<sup>24</sup> This opened the door to defendants who wished to execute on choses in action against themselves to avoid defending against a plaintiff's claim on the merits.<sup>25</sup> However, there are also some constitutional protections associated with choses in action, such as the right to a jury trial and the right of access to a state's courts, that may act as a barrier to defendants hoping to execute on choses in action against themselves.<sup>26</sup>

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17. See *infra* Part IV.B.1.

18. See *infra* Part IV.B.2.

19. See *infra* Part IV.B.3.

20. See *infra* Part IV.C.

21. Isaac Marcushamer, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543, 1550–51 (2005).

22. See *Equity Portfolio, LLC, Ltd. v. Schriever*, 799 A.2d 1236, 1237 (Me. 2002) ("Equity sought judicial enforcement of the money judgment via a writ of execution, which permits the county sheriff to seize and sell the debtor's property.").

23. *Woody's Olympia Lumber, Inc. v. Roney*, 513 P.2d 849, 850 (Wash. Ct. App. 1973).

24. See, e.g., UTAH R. CIV. P. 69(f) (repealed 2004).

25. See, e.g., *Johnson v. Dahlquist*, 225 P. 817, 818 (Wash. 1924).

26. See, e.g., *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306–07 (Tex. App. 1992).

A. *A Plaintiff's Claim Is a "Chose in Action"*

A plaintiff's cause of action generally falls under a specific category of property called a chose in action.<sup>27</sup> Black's Law Dictionary defines a chose in action as:

- (1) A proprietary right in personam, such as debt owed by another person, a share in a joint-stock company, or a claim for damages in tort.
- (2) The right to bring an action to recover a debt, money, or thing.
- (3) Personal property that one person owns but another person possesses, the owner being able to regain possession through a lawsuit.<sup>28</sup>

A plaintiff's claim for relief is encompassed by the second definition: "[t]he right to bring an action to recover a debt, money, or thing."<sup>29</sup>

Choses in action could not be sold at common law.<sup>30</sup> This rule was based on the notion that choses in action arise from personal relationships between parties and that one cannot alienate a personal relationship.<sup>31</sup> Another underlying rationale was the notion that allowing the transfer of claims would lead to increased litigation by encouraging champerty and

27. *Brown v. Fletcher*, 235 U.S. 589, 595–96 (1915) (“[A] ‘chose in action embraces in one sense all rights of action.’” (quoting *Dundas v. Bowler*, 8 F. Cas. 28, 29 (C.C.D. Ohio 1843))); *Garrett v. Gay*, 394 So. 2d 321, 322 (Miss. 1981) (“A ‘chose in action’ means, literally, a thing in action, and is the right of bringing an action, . . . or a right of proceeding in a court of law to procure the payment of a sum of money, or . . . a right to recover money or personal property by a judicial proceeding.” (quoting 73 C.J.S. *Property* § 9 (1951))).

28. BLACK’S LAW DICTIONARY 275 (9th ed. 2009). The term “chose in action” can thus refer to the right to bring suit to recover some item of property or the item of property itself. For the purposes of this Comment, the term “chose in action” will refer only to a party’s right to bring suit, encompassed in the first and second of the three definitions.

29. *Id.* This Comment is unconcerned with execution on choses in action fitting the first and third definitions but not the second. However, there is some overlap between the various definitions. For example, if one executes upon and purchases a debt, then one purchases the right to bring an action to collect that debt. See *Johnson*, 225 P. at 818.

30. J.B. Ames, *The Disseisin of Chattels*, 3 HARV. L. REV. 337, 337 (1890) (“In a word, no right of action, whether a right *in rem* or a right *in personam*, whether arising *ex contractu* or *ex delicto*, was assignable either by act of the party or by operation of law.”). However, this rule was subject to some limited exceptions. *Id.* at 338. For example, the sovereign could assign a chose in action, or a party could grant an interest to “A. and his assigns” in an annuity, land, or warranty, and the assignee would be able to bring suit against the grantor of the interest. *Id.*

31. *Id.* at 339.

maintenance.<sup>32</sup> Over time this rule eroded, and by the nineteenth and early twentieth centuries, it had disappeared almost entirely.<sup>33</sup> Today, choses in action are widely recognized as alienable forms of personal property.<sup>34</sup>

### B. *The Law of Execution*

As it is well known, the end result of litigation on the merits of a case is a final judgment—one that determines the rights and interests of the parties to the litigation and either grants or denies the relief sought.<sup>35</sup> When a judgment for money damages is entered, the court may not need to take further action if the indebted party simply pays, or “satisfies,” the

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32. Marcushamer, *supra* note 21, at 1550–51. Blackstone defines champerty as “a species of maintenance . . . : being a bargain with a [party to litigation] to divide the [subject of the suit], if they prevail at law; whereupon the champertor is to carry on the party’s suit as his own expense.” 4 WILLIAM BLACKSTONE, COMMENTARIES \*134–35. Maintenance is defined as the “officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it.” *Id.* at \*134. Medieval jurists feared that such behavior would lead to an increase in litigation. Marcushamer, *supra* note 21, at 1551 (“Medieval society viewed legal proceedings as a dangerous procedure; this is not surprising considering a legal system that permitted trial by battle. The inherent physical danger of trial, coupled with the Christian sentiment of forgiveness and turning the other cheek, led people to believe that litigation was an indication of an un-Christian spirit.” (internal footnotes omitted)). The tactic discussed in this Comment does not raise any of the traditional concerns that prohibited the assignment of a chose in action because allowing a judgment creditor to execute on and extinguish claims against itself does not encourage litigation, but ends it.

33. See Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 826–29 (1916).

34. See Marcushamer, *supra* note 21, at 1553–65 (identifying four approaches to assignment of claims in the American legal system today, including: (1) no enforcement or recognition of maintenance and champerty, leading to full alienability of all choses in action; (2) prohibiting only lawyers from engaging in champerty, leading to narrow limitations on the assignability of choses in action; (3) allowing assignment of some choses in action and prohibiting assignment of others due to concerns of champerty, based on (a) whether the claim survives, or (b) the intent of the person providing financial support for the litigation; and (4) enforcement of prohibitions on champerty, maintenance, and assignment). Only two states still prohibit champerty and maintenance: Georgia and Illinois. *Id.* at 1563–64. Georgia considers contracts for the sale of causes of action to violate public policy, and Illinois prohibits maintenance, but only if done with a view to promote litigation. *Id.* (citing GA. CODE ANN. § 13-8-2(a)(5) (West 2004); 720 ILL. COMP. STAT. ANN. 5/32-12 (West 2004)).

The right to sell a chose in action strongly suggests that choses in action are property interests; however, the mere fact that one can sell one’s chose in action does not categorically mean that choses in action may be reached through levy and execution. See *Woody’s Olympia Lumber, Inc. v. Roney*, 513 P.2d 849, 853 (Wash. Ct. App. 1973) (holding that “[a]ssignability affects the value of a property right, but its absence does not extinguish it” when faced with the debtor’s argument that his unliquidated tort claim for pain and suffering was not subject to execution because it was not assignable). But see *Scarlett v. Barnes*, 121 B.R. 578, 580–81 (Bankr. W.D. Mo. 1990) (“Thus, if a debtor’s cause of action is not assignable, a court cannot coerce the debtor, by means of a creditor’s bill, to assign the cause of action to his creditor.”) (applying Missouri’s execution statute).

35. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

judgment.<sup>36</sup> However, if the judgment debtor does not satisfy the judgment, the judgment creditor has an array of procedural tools that can be used to enforce the judgment.<sup>37</sup> One of these tools is a writ of execution.<sup>38</sup>

A writ of execution is an expression of the court's inherent power to enforce its judgments.<sup>39</sup> At its most basic level, a writ of execution is simply the court's written command to its officer to seize (or "levy")<sup>40</sup> and sell the judgment debtor's property and then give the proceeds to the judgment creditor.<sup>41</sup> One court explained:

The purpose of execution of a judgment is not merely to take property out of the hands of the losing party, but rather is also to transfer that property to the hands of the prevailing party—where,

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36. See *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1076 (10th Cir. 2010) (noting that "[p]laintiff could have paid the judgment" to avoid execution); *Salveter v. Salveter*, 53 P.2d 381, 381 (Cal. Ct. App. 1936) ("Payment of a judgment satisfies it and extinguishes it."); *Rondack Const. Servs., Inc. v. Kaatsbaan Int'l Dance Ctr., Inc.*, 864 N.Y.S.2d 127, 129 (N.Y. App. Div. 2008) ("When the judgment debtor tenders the amount necessary to satisfy the judgment, the execution lien is discharged."), *aff'd*, 923 N.E.2d 561 (N.Y. 2009). This Comment is concerned only with enforcement of judgments for money damages, and not enforcement of judgments that order specific performance or other equitable remedies.

37. In addition to execution, other examples of these tools include garnishment and turnover. Garnishment is a court order served on one who owes money to a judgment debtor that orders the person served to pay the sheriff rather than the judgment debtor. MARK S. SCARBERRY ET AL., *BUSINESS REORGANIZATION IN BANKRUPTCY* 9 (2d ed. 1996). In California, garnishment is the proper means of reaching unliquidated tort claims. CAL. CIV. PROC. CODE § 487.010 (West 2009). Similarly, California law allows a judgment creditor to obtain a lien on a judgment debtor's pending choses in action. CAL. CIV. PROC. CODE § 708.410(a) (West 2009). Turnover orders can be obtained when the judgment debtor owns property that cannot be reached by ordinary legal process. *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 761–62 (Tex. App. 1992). In Texas, "the court has discretion . . . to determine how to use the property to satisfy the judgment" under a turnover order. *Id.* It may order the property sold through execution, placed in the hands of a receiver to be sold, or to "otherwise apply the property to the satisfaction of the judgment." *Id.*

38. FED. R. CIV. P. 69(a)(1) ("A money judgment is enforced by a writ of execution, unless the court directs otherwise."). "Execution is the process of the court by which it provides for the enforcement of a final judgment it has rendered in an action after it has determined the issues and adjudged a recovery." *Mehdipour v. Holland*, 177 P.3d 544, 550 (Okla. 2007). It has been described as "a bitter, last resort, favorable to no one (save, perhaps, the sheriff[, who collects fees])." ROGER A. NEEDHAM & LESTER POLLACK, *COLLECTING CLAIMS AND ENFORCING JUDGMENTS* § 12.2 (1969).

39. *RMA Ventures*, 576 F.3d at 1074; 30 C.J.S. *Executions* § 1 (2009).

40. BLACK'S LAW DICTIONARY 991 (9th ed. 2009) (defining "levy" as "to take or seize property in execution of a judgment").

41. See *Kelley v. Vincent*, 8 Ohio St. 415, 420–21 (1858) (discussing the precise nature of a writ of execution in detail).



by virtue of the judgment itself, it has been decided through due process and course of law that the property belongs.<sup>42</sup>

As the above language suggests, the process of executing on a judgment debtor's property strongly favors the judgment creditor, who has already litigated the case on the merits and prevailed.<sup>43</sup>

However, the judgment debtor is not entirely forsaken by the law, as the process of levy and execution has some built-in safeguards meant to protect the judgment debtor's interests and prevent a windfall for the judgment creditor that might result from the outright transfer of assets from the judgment debtor to the judgment creditor.<sup>44</sup> First, "[t]he public auction procedure provides a key safeguard" for a judgment debtor because the public nature of the sale provides an opportunity for the open market to determine the value of the judgment debtor's property.<sup>45</sup> Second, state execution statutes also require public notice for a certain period of time so that potentially interested bidders, including the judgment debtor, will have the opportunity to attend and bid at the sale.<sup>46</sup> Third, if an execution sale results in proceeds in excess of the value of the judgment, the surplus will be returned to the judgment debtor.<sup>47</sup> However, if the property sells for less than the value of the judgment, the judgment creditor will be entitled to a deficiency judgment; thus, the judgment debtor will still be liable for the remainder of the judgment.<sup>48</sup> These procedural safeguards recognize that a writ of execution is a powerful tool, but one which is meant only to aid in the collection of the judgment.<sup>49</sup> A writ of execution should not go so far as

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42. *McVeigh v. Lerner*, 849 S.W.2d 911, 915 (Tex. App. 1993). Of course, a writ of execution does not transfer the property directly; rather, the judgment creditor is only entitled to the proceeds from the sale of the property up to the amount of the judgment. *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 212 (Utah 1999).

43. *See Cnty. Trust Co. v. Berg*, 318 N.Y.S.2d 154, 156 (Sup. Ct. 1971) ("The policy of the law is to assist rather than to make it more difficult for the judgment creditor.").

44. *See Amphibious Partners LLC v. Redman*, 389 F. App'x 762, 767–68 (10th Cir. 2010) (providing an outstanding discussion of the protections offered by the process of levy and execution of a judgment debtor's property).

45. *Id.* at 767; *see also Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1011 (Miss. 2006) (noting that property sold at an execution sale will go to the highest bidder). However, there is some doubt as to whether unliquidated claims actually fetch a fair value when sold at a public auction. *See infra* notes 259–73 and accompanying text.

46. *See Citizens Nat'l*, 935 So. 2d at 1011, 1012 (describing how Mississippi law "requires at least ten days of pre-sale advertising"); *see also Amphibious Partners*, 389 F. App'x at 767 ("A public sale also provides a judgment debtor an opportunity to bid on their own [property], or convince a third party to bid an amount higher than the value of the judgment.").

47. *NEEDHAM & POLLACK*, *supra* note 38, § 12.7.

48. *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 212 (Utah 1999).

49. *Paglia v. Breskovich*, 522 P.2d 511, 514 (Wash. Ct. App. 1974).

to “outrage the right of a judgment debtor,”<sup>50</sup> and excessive levy is not allowed.<sup>51</sup>

The procedure for execution of a judgment is governed almost exclusively by state law.<sup>52</sup> Under the Federal Rules of Civil Procedure, even judgments entered by federal courts on claims arising under federal law are enforced according to the law of execution of the state in which the district court is located in the absence of a federal statute to the contrary.<sup>53</sup> Consequently, “[t]he law governing execution of judgments is highly complex and in this country is subject [to] a good deal of technical variation from one state to another.”<sup>54</sup> Thus, the procedure for execution is, in the vast majority of cases, governed by state statutes and surrounding case law.<sup>55</sup>

Most states follow a similar procedure.<sup>56</sup> Once a final judgment for money damages is entered, the judgment creditor is entitled to a writ of execution.<sup>57</sup> Through supplemental proceedings, the judgment creditor may conduct discovery into the judgment debtor’s assets to assess what property can be levied and sold under the writ.<sup>58</sup> Which specific items of the

50. *Id.* (citing *Triplett v. Begman*, 114 P. 899, 900 (Wash. 1914)).

51. *Capozzi v. Antonoplos*, 201 A.2d 420, 422 (Pa. 1964).

52. Doreen J. Gridley, Note, *The Immunity of Intangible Assets from a Writ of Execution: Must We Forgive Our Debtors?*, 28 IND. L. REV. 755, 764 (1995).

53. FED. R. CIV. P. 69(a)(1) (“A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.”). One obvious context in which federal execution statutes may preempt state execution rules is bankruptcy proceedings. 11 U.S.C. § 541 (2006) (defining property subject to execution and including choses in action in that definition).

54. RESTATEMENT (SECOND) OF JUDGMENTS intro. note c (1980).

55. *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1074 (10th Cir. 2009); *see, e.g., McBurney v. Shaw*, 804 A.2d 467, 470 (N.H. 2002) (“Executions and levy of executions are governed by statute . . .”); *Abercia v. Kingvision Pay-Per-View, Ltd.*, 217 S.W.3d 688, 694 (Tex. App. 2007) (“Execution is governed by rule and statute.”).

56. *See* NEEDHAM & POLLACK, *supra* note 38, § 12.1.

57. *Katz v. N.M.E. Hosps., Inc.*, 842 So. 2d 853, 854 (Fla. Dist. Ct. App. 2002) (“Absent a supersedeas bond or order staying further proceedings in relation to the judgment, judgment creditors are entitled to pursue execution and collection of the judgment.”). *See infra* notes 71–86 and accompanying text (discussing stays and supersedeas bonds). In several northeastern states, a writ of execution may not issue until the expiration of the appeal period or the resolution of any appeal taken from the judgment. *See, e.g.,* MASS. GEN. LAWS ch. 235, § 16 (2010) (“No execution shall issue upon a judgment until the exhaustion of all possible appellate review thereof . . .”); ME. REV. STAT. tit. 14, § 4651 (2010) (writ may not issue until expiration of period for appeal or until dismissal by the appellate court); N.H. REV. STAT. ANN. § 527:1 (2010) (“No execution shall issue until the expiration of the appeal period.”); N.J. STAT. ANN. § 2A:17-8 (West 2010) (writs may not issue until the resolution of a pending appeal).

58. *See* FED. R. CIV. P. 69(a)(2) (directing federal district courts to apply state law execution proceedings); *see generally* NEEDHAM & POLLACK, *supra* note 38, ch. 13.

judgment debtor's property are available for execution is governed by statute.<sup>59</sup> These statutes can be extremely broad, authorizing execution on all of the judgment debtor's property, then carving out specific, narrow exceptions.<sup>60</sup> Other states affirmatively name specific types of property belonging to a judgment debtor that are subject to execution.<sup>61</sup> The judgment creditor exercises a large degree of control over the selection of the property to be sold under the writ of execution, unless state law provides otherwise.<sup>62</sup> However, a court does retain a measure of control over the enforcement of its own judgments.<sup>63</sup>

By the time the litigants have reached the stage in the litigation where a court may issue a writ of execution, the judgment creditor has prevailed on the merits and petitioned the court for the levy and execution on specific property of the judgment debtor.<sup>64</sup> If the judgment debtor wishes to challenge the writ, he must do so before the writ issues and the sheriff's sale takes place, as a writ of execution generally may not be challenged collaterally.<sup>65</sup> One possible way to challenge a writ of execution is to move to quash the writ.<sup>66</sup> A motion to quash attacks the validity of the writ of execution.<sup>67</sup> Possible grounds for a motion to quash a writ of execution are that a judgment is void, that the judgment debtor is not the sole owner of the property, or that the property sought to be levied upon is not subject to execution.<sup>68</sup> The judgment debtor, in filing a motion to quash the writ, may

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59. See *RMA Ventures*, 576 F.3d at 1075 (examining Utah statutes and case law to determine property subject to execution).

60. See, e.g., OR. REV. STAT. § 18.345 (2009); WASH. REV. CODE § 6.17.090 (2011).

61. See, e.g., CAL. CIV. PROC. CODE § 487.010 (West 2009). California further varies its execution statute by differentiating between property subject to execution based on what type of entity the debtor is, such as a corporation as opposed to a natural person. *Id.*

62. See, e.g., *Smith v. Hanson*, 293 N.W. 551, 556 (N.D. 1940) ("The authorities are generally agreed that, in absence of statute providing to the contrary, a judgment creditor at whose instance an execution is issued is entitled to exercise a considerable degree of control, and to give directions to the officer as to the time and manner of executing the writ, and the particular property to be subjected to levy and sale.").

63. See, e.g., *MP Med. Inc. v. Wegman*, 213 P.3d 931, 936 (Wash. Ct. App. 2009); see also *Capozzi v. Antonoplos*, 201 A.2d 420, 422 (Pa. 1964) ("The court below certainly had the power of control over its own execution process and to act to prevent an abuse thereof.").

64. See, e.g., *Johnson v. Dahlquist*, 225 P. 817, 817 (Wash. 1929).

65. See *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1071 (10th Cir. 2010) (upholding sale of defendant's property in part because defendant failed to challenge the writ of execution when it was issued). There are exceptions to this rule, however. See *Paglia v. Breskovich*, 522 P.2d 511, 514 (vacating a writ of execution on a judgment debtor's choses in action after the sale was complete).

66. See *RMA Ventures*, 576 F.3d at 1072 ("Plaintiff filed a motion to stay or quash the execution sale.").

67. *Interstate Life Ins. Co. v. Arrington*, 307 S.W.2d 146, 148 (Tex. App. 1957) ("[T]he general rule [is] that a proceeding to set aside an execution is a direct attack on the process and that challenging validity of the execution in any other proceeding is a collateral attack.").

68. See 33 C.J.S. *Executions* §§ 287–327 (2005).

not challenge the underlying judgment on the merits and must attack only the writ of execution itself.<sup>69</sup> The trial court's ruling is subject to the appellate process.<sup>70</sup>

Another common way for judgment debtors to prevent a writ of execution from being carried out is by obtaining a stay.<sup>71</sup> "A stay of execution is the stopping or arresting of execution on a judgment, or of the creditor's right to issue execution, for a limited period."<sup>72</sup> Some states hold that a stay may be granted at the discretion of the court by virtue of its own inherent authority over its judgments, although statutory procedures for obtaining a stay may also exist.<sup>73</sup> Others hold that because execution is a statutory proceeding, the only way to obtain a stay of execution is by meeting the statutory requirements.<sup>74</sup> Many states, either through statutes or rules of court, require the judgment debtor to post some form of security in order to obtain a stay.<sup>75</sup>

One common context in which stays are granted is pending the resolution of an appeal taken from the judgment to be enforced.<sup>76</sup> Generally, "the mere pendency of an appeal does not operate to stay execution proceedings."<sup>77</sup> In most states, a judgment debtor must post a supersedeas bond, usually consisting of a sum of money or property sufficient to ensure

69. *Wycoff v. Wycoff*, 374 So. 2d 614, 616 (Fla. Dist. Ct. App. 1979) ("[E]rrors of law do not constitute good cause for granting a stay of execution. . . ."); *Smith v. Smith*, 797 S.W.2d 798, 800 (Mo. Ct. App. 1990) ("A motion to quash an execution cannot be substituted for an appeal . . .").

70. *See MP Med. Inc. v. Wegman*, 213 P.3d 931, 934 (Wash. Ct. App. 2009).

71. *See, e.g., Brenton Bros. v. Dorr*, 239 N.W. 808, 810 (Iowa 1931) (holding that a trial court may grant a stay of execution for a reasonable time to "escape the inequitable use of the writ").

72. 33 C.J.S. *Executions* § 247 (2009).

73. *See, e.g., City of Easton v. Marra*, 862 A.2d 170, 174 (Pa. Commw. Ct. 2004) ("It is an equally accepted principle that a court in which an execution proceeding is pending has the inherent power to stay the proceeding upon legal or equitable grounds, when it is necessary to protect the rights of a party."); *see also* 33 C.J.S. *Executions* § 248 (2009). The federal court system also adheres to this rule, allowing some flexibility in the amount of supersedeas or acceptable property. *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 760–61 (D.C. Cir. 1980) ("In unusual circumstances . . . the district court in its discretion may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery."); *Athridge v. Iglesias*, 464 F. Supp. 2d 19, 24–25 (D.D.C. 2006) (memorandum opinion) (holding that defendants may post real estate holdings as security in lieu of a full supersedeas bond).

74. *See, e.g., Looney v. Raby*, 268 S.W.3d 345, 350 (Ark. Ct. App. 2007) ("Section 16-66-301(a) and its accompanying statutes contain the exclusive means of staying or vacating writs of execution, and all other means are excluded."); *see also* 33 C.J.S. *Executions* § 248 (2009).

75. 33 C.J.S. *Executions* § 261 (2009).

76. *See, e.g., Athridge*, 464 F. Supp. 2d at 24, 25.

77. 33 C.J.S. *Executions* § 253 (2009); *see also FM. Indus., Inc. v. Citicorp Credit Servs., Inc.*, 656 F. Supp. 2d 795, 799 (N.D. Ill. 2009) (applying Illinois law).

payment of the judgment,<sup>78</sup> in order to obtain a stay while an appeal is pending.<sup>79</sup> A supersedeas bond is meant “to preserve the status quo while protecting the non-appealing party’s rights pending appeal.”<sup>80</sup> Once the supersedeas bond is posted, a stay order issues, which essentially orders the trial court to stop all proceedings for enforcement of the judgment pending the outcome of the appeal.<sup>81</sup> In some jurisdictions, including the federal system, courts have the authority to vary the amount of supersedeas required or to accept other property in lieu of cash as security in extraordinary circumstances.<sup>82</sup>

A party technically does not need to post a supersedeas bond to pursue an appeal because “[a] judgment debtor who is unable or is unwilling to post a supersedeas bond retains the right to appeal even if the judgment is executed.”<sup>83</sup> Similarly, whether a judgment debtor posts a supersedeas bond to stay execution of a judgment pending appeal ordinarily has no bearing on the outcome of the appeal.<sup>84</sup> However, while “[n]o security or undertaking for costs is necessary to perfect an appeal[,] . . . the appeal [itself] does not stay the enforcement of the judgment. Accordingly, failure to obtain a stay of execution may result in an execution being levied.”<sup>85</sup> If the judgment debtor’s property is levied and sold at execution and the judgment debtor obtains a reversal of the underlying judgment on appeal, he may be entitled

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78. 5 AM. JUR. 2D *Appellate Review* § 402 (2007).

79. See, e.g., FED. R. CIV. P. 62(d) (“If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.”). However, in federal courts, a judgment debtor must also show that granting a stay would be proper based on a balancing test extremely similar to that for a preliminary injunction, based on “(1) a reasonable probability of success on appeal, (2) the prospect of irreparable injury . . . if relief is not granted; (3) the possibility of harm to other interested persons and (4) the public interest.” *Hoots v. Pennsylvania*, 651 F.2d 177, 177 (3d Cir. 1981); see also *Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

80. *Prudential Ins. Co. of Am. v. Boyd*, 781 F.2d 1494, 1498 (11th Cir. 1986); see also *In re Koome*, 514 P.2d 520, 522–23 (Wash. 1973) (“A stay order finds its genesis in the writ of supersedeas, originally an auxiliary process designed to supersede enforcement of a judgment or order brought up for review, thereby maintaining the status quo and preserving the fruits of the appeal should it prove successful.”).

81. 5 AM. JUR. 2D *Appellate Review* § 398 (2007).

82. *Fed. Prescription Serv. Inc. v. Am. Pharm. Ass’n*, 636 F.2d 755, 760 (D.C. Cir. 1980); *Athridge v. Iglesias*, 464 F. Supp. 2d 19, 24–25 (D.D.C. 2006).

83. *Strong v. Laubach*, 443 F.3d 1297, 1299 (10th Cir. 2006).

84. See NEEDHAM & POLLACK, *supra* note 38, § 11.8. However, when a judgment creditor obtains a writ of execution on the underlying chose in action, purchases it at the execution sale, and dismisses the appeal, the appeal never reaches a determination on the merits. See *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1076 (10th Cir. 2009). Thus, when a judgment creditor obtains the judgment debtor’s appeal and underlying cause of action against the judgment creditor through a writ of execution, the consequences are unique.

85. NEEDHAM & POLLACK, *supra* note 38, § 11.8.

to restitution for the sale or, if it is within the power of the court, the return of his property.<sup>86</sup>

In sum, execution is one of the primary methods through which a judgment creditor may enforce his judgment against the judgment debtor.<sup>87</sup> Generally, the policy of the court is to assist the judgment creditor in satisfying the judgment.<sup>88</sup> However, there are some protections for a judgment debtor built into the execution process, and execution is not meant to infringe on the judgment debtor's rights beyond the extent necessary to satisfy the judgment.<sup>89</sup> Moreover, the judgment debtor can contest the writ of execution directly by filing a motion to quash or by obtaining a stay of execution.<sup>90</sup> It is within this framework that one must analyze whether a judgment creditor should be permitted to use a writ of execution to obtain and dismiss choses in action against itself.

### C. Choses in Action as Property Subject to Execution

As noted above, there is a great deal of variation among the states as to which types of property are subject to execution.<sup>91</sup> While most states allow writs of execution to issue for personal property or real property, states vary considerably on which forms of intangible property are subject to a writ of execution.<sup>92</sup> Choses in action, as a form of intangible property, are no exception.<sup>93</sup>

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86. *Strong*, 443 F.3d at 1299 (“Should the judgment be reversed on appeal, a district court may, on motion or sua sponte, order the judgment creditor to restore the benefits obtained.”); *NEEDHAM & POLLACK*, *supra* note 38, § 11.8 (noting that a judgment debtor would have to resort “to the permissive remedy of . . . restitution” should he succeed on appeal). However, in cases where the party defending against the appeal levies and executes on the underlying cause of action and the appeal itself, then purchases those choses in action at the execution sale intending to dismiss it, the appeal does not survive. *See, e.g., RMA Ventures*, 576 F.3d at 1075. Moreover, because the appeal is never heard on the merits, the judgment debtor has no hope of recovering “the benefits obtained” by the judgment creditor. *See id.*

87. *Gridley*, *supra* note 52, at 756 (noting that a writ of execution is preferred over other methods for enforcing a judgment).

88. *See Cnty. Trust Co. v. Berg*, 318 N.Y.S.2d 154, 156 (Sup. Ct. 1971).

89. *Amphibious Partners LLC v. Redman*, 389 F. App'x 762, 767–68 (10th Cir. 2010); *Paglia v. Breskovich*, 522 P.2d 511, 514 (Wash. Ct. App. 1974).

90. *See RMA Ventures*, 576 F.3d at 1071.

91. RESTATEMENT (SECOND) OF JUDGMENTS intro. note c (1980).

92. *Gridley*, *supra* note 52, at 755–56 (focusing primarily on intellectual property rights).

93. *Id.*

At common law, choses in action are inalienable and are thus not subject to execution.<sup>94</sup> Therefore, if choses in action are subject to execution at all it is because a state statute authorizes execution on them.<sup>95</sup> Indeed, “most states . . . have abrogated that common law by statute.”<sup>96</sup> However, just as state statutes vary in what types of property they deem subject to execution, states also vary on whether they deem all categories of choses in action to be reachable by execution or only some.<sup>97</sup> For example, some states allow judgment creditors to reach debts but do not permit execution on pending choses in action.<sup>98</sup> Other states have exceedingly broad execution statutes that allow judgment creditors to execute on all of a judgment debtor’s property, including pending choses in action or even potential choses in action that have not yet been asserted.<sup>99</sup>

Of the states that allow execution on pending choses in action, some may explicitly authorize execution on *all* choses in action.<sup>100</sup> Others simply

94. *Woody’s Olympia Lumber, Inc., v. Roney*, 513 P.2d 849, 850 (Wash. Ct. App. 1973); Gridley, *supra* note 52, at 775.

95. *See, e.g., Prodigy Ctrs./Atlanta v. T-C Assocs.*, 501 S.E.2d 209, 211 n.3 (Ga. 1998) (citing GA. CODE ANN. § 9-13-57 (West 1996) (“Choses in action are not liable to be seized and sold under execution, unless made so specifically by statute.”)); *Woody’s*, 513 P.2d at 850 (citing WASH. REV. CODE § 6.04.060 (1972) (Washington’s statute enables execution on “all property, real and personal.”)).

96. *Woody’s*, 513 P.2d at 850.

97. *See* Gridley, *supra* note 52, at 766–67 (describing procedural alternatives available in various states for reaching intangible assets).

98. This Comment is only concerned with those states that allow execution upon most or all choses in action, including unliquidated tort claims and pending choses in action. Thus, states that do not allow execution on this type of chose in action warrant no further discussion here. *See, e.g., CAL. CIV. PROC. CODE* § 699.720(a)(3) (West 2009) (pending choses in action not subject to execution). Interestingly, California allowed a judgment creditor to execute on choses in action against itself until 1941, when the legislature enacted a statute disallowing the tactic. *Denham v. Farmers Ins. Co.*, 213 Cal. App. 3d 1061, 1071 (1989) (describing the development of California law); *Abbati v. Eldridge*, 103 Cal. App. 3d 484, 487 (1980) (same); *see also* *Everts v. Will S. Fawcett Co.*, 24 Cal. App. 2d 213, 217 (1937) (allowing defendant to execute on a claim against itself); *Meserve v. Superior Court*, 2 Cal. App. 2d 468, 472 (1934) (same). California now allows a judgment creditor to obtain a lien on pending choses in action, but such a lien is enforceable only after the chose in action has been reduced to judgment and the time for appeal has expired. *CAL. CIV. PROC. CODE* §§ 708.410(a), 708.480 (West 2010). Other states have different approaches. *See, e.g., Prodigy Ctrs.*, 501 S.E.2d at 211 n.3 (“Choses in action are not liable to be seized and sold under execution unless made so specially by statute.”); *Haines v. Pub. Fin. Corp.*, 218 N.E.2d 727 (Ohio Ct. App. 1966) (holding that choses in action are not subject to a writ of attachment or garnishment). Sometimes, there are procedural tools to reach causes of action in place of execution, for example, garnishment. *See Cagle v. Butcher*, 575 P.2d 321, 323 (Ariz. 1978).

99. *See Woody’s*, 513 P.2d at 853–54 (“Our statute is sufficiently broad to include unliquidated tort claims even if of dubious value, and we see no reason to limit by judicial construction or prohibit the judicial process of attachment or execution by excluding such claims.”).

100. *See, e.g., NEV. REV. STAT.* § 21.080(1) (2009); *R.I. GEN. LAWS* § 9-28-1 (2009) (as interpreted by *In re Howe*, 232 B.R. 534 (B.A.P. 1st Cir. 1999)). Despite the broad language of these statutes, one must proceed with caution. For example, Arizona provides a somewhat baffling example of how misleading these statutes can be. *Cagle*, 575 P.2d at 323. Arizona’s general execution statute provides for execution upon “[s]hares and interest in a corporation, and debts and

authorize execution upon all property of the judgment debtor.<sup>101</sup> Within this category, other variations exist within each state's case law, such as those states that allow execution only on those claims that are transferrable.<sup>102</sup>

In sum, for a defendant to execute on choses in action against itself, it must first be in a state that allows judgment creditors to execute on choses in action.<sup>103</sup> Because there is no clear rule that applies in every state, one must look to the law of the forum to determine which choses in action are subject to execution and under what circumstances.<sup>104</sup> However, even if a state allows judgment creditors to execute on choses in action in general, there may be constitutional protections associated with choses in action that prevent a judgment creditor from obtaining choses in action against itself through a writ of execution.<sup>105</sup>

#### *D. Constitutional Protections Associated with Choses in Action*

The United States Constitution and most state constitutions have guarantees associated with choses in action that are implicated when a

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credits, choses in action, and all other property, or any interest therein, legal or equitable, not capable of manual delivery, may be levied upon and sold under execution." ARIZ. REV. STAT. ANN. § 12-1558 (2009). This statute appears to fall squarely within the broad authorization of states like Washington and Oregon. See WASH. REV. CODE § 6.17.090 (2011); OR. REV. STAT. § 18.345 (2009). However, in *Cagle*, the Arizona Supreme Court held that the proper method for reaching a chose in action was garnishment and not execution. *Cagle*, 575 P.2d at 323. The court cited Arizona Revised Statutes section 12-1559, which prescribes the *method* for levy and sale of a judgment debtor's property upon execution of a judgment. *Id.* The court reasoned that section 12-1559 outlines "a procedure for levying on certain intangibles such as the stock of a corporation or an interest in a partnership, but no similar procedure is provided for a chose in action." *Id.* Arizona's execution procedure statute still does not provide a procedure for execution of choses in action; thus, *Cagle* is still good law. See ARIZ. REV. STAT. § 12-1559 (2009).

101. See, e.g., OR. REV. STAT. § 18.345 (2009); UTAH R. CIV. P. 69A(c); WASH. REV. CODE § 6.17.090 (2011). These states' statutes usually include a list of exempt property. See, e.g., OR. REV. STAT. § 18.345(a)–(o) (2009) (exempting, for example, household goods, tools of the debtor's trade, clothing, and an automobile, that are below a certain amount in value).

102. See *Scarlett v. Barnes*, 121 B.R. 578, 580–81 (Bankr. W.D. Mo. 1990). Missouri falls into the category of states that do not allow assignment of choses in action that do not survive the holder's death, and the courts have held that they cannot compel assignment of property that a debtor cannot assign voluntarily. See *id.* at 580. On the other hand, Washington falls into the same category, forbidding the transfer of tort claims that do not survive the death of the claimant, but does allow courts to compel assignment of those claims through execution. See *Woody's*, 513 P.2d at 853. Thus, assignability may or may not be a salient factor in whether property is subject to execution. If a litigant is in a state that has not yet decided the issue, it is certainly worth arguing.

103. See *Woody's*, 513 P.2d at 850; Gridley, *supra* note 52, at 775.

104. See *supra* notes 94–102 and accompanying text.

105. See, e.g., *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306–07 (Tex. App. 1992).



judgment creditor attempts to execute on choses in action against itself.<sup>106</sup> For example, the United States Constitution guarantees a right to a jury trial in some civil cases.<sup>107</sup> At least one court, the Court of Appeals of Texas, has stated that a plaintiff's right to a jury trial may be violated when a judgment creditor extinguishes a claim against itself using a writ of execution.<sup>108</sup> However, in a majority of federal jurisdictions, this right is attached only to claims that would have had the right to a jury trial in 1791.<sup>109</sup> Thus, the right is associated with the claim—a chose in action—and probably transfers with it.<sup>110</sup> Many state constitutions also guarantee a right to a jury trial, along with other rights such as a right of access to the courts.<sup>111</sup>

Forty state constitutions guarantee their citizens the right of access to the courts of those states and the right to a remedy through “open courts clauses.”<sup>112</sup> Despite general similarities in the wording of these clauses (there are two main archetypes), courts have varied widely in their interpretation of these guarantees.<sup>113</sup> Some states view the right as “little more than . . . [a] historical relic,” and others view it as “second only to the

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106. See, e.g., U.S. CONST. amend. VII; TEX. CONST. art. I, §§ 13, 15 (right of access to the courts and the right to a jury trial).

107. U.S. CONST. amend. VII.

108. *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 762 (Tex. App. 1992). The court in *Associated* noted in passing that allowing a judgment creditor to execute on choses in action against itself “has the effect of denying [plaintiff] the right to a jury trial,” but decided the case on other grounds. *Id.* It is unclear whether the court was discussing the federal Constitution or Texas constitution.

109. STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 559 (7th ed. 2008).

110. Cf. *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 702–03 (Utah 2002). In *Applied Medical*, the Supreme Court of Utah held that the Utah constitution’s guarantee of a citizen’s right of access to the courts is not violated when a judgment creditor executes on choses in action against itself because the right transfers with the claim. *Id.* This is probably sufficiently analogous to the right to a jury trial to conclude that the right to a jury trial is also transferred when one transfers a claim. See *id.* After all, one cannot claim a right to a trial by jury if one does not even have the right to appear in court.

111. See, e.g., TEX. CONST. art. I, §§ 13, 15.

112. Thomas R. Phillips, Speech, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003). The rights guaranteed by these clauses are known by other names, depending on the states. *Id.* at 1317. Some of these names include: “access to the courts,” “remedies,” “right to the courts,” “certain remedy,” “guaranteed remedy,” “right to a remedy,” or “remedy due course of law.” *Id.* at 1317 n.33.

113. *Id.* at 1314. According to Judge Phillips, one type reads:

That every person for every injury done him in his goods, land or person, ought to have [a] remedy by the course of the law of the land and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

*Id.* at 1311. This type can be found in eleven state constitutions. *Id.* The second type is more concise: “That all courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by the due course of the law.” *Id.* Judge Phillips notes that twenty-seven states use this form. *Id.* This amounts to thirty-eight states with an explicit open courts clause. See *id.* Presumably, the other two states recognizing the right have implied its existence. See *id.*

due process clause in importance.”<sup>114</sup> Courts have used open courts clauses for such varied purposes as invalidating statutes that impose restrictions on the right to bring medical malpractice claims, invalidating statutes of repose, invalidating statutes allowing defamers to retract their statements, and opening court proceedings to the public.<sup>115</sup>

Some litigants have argued before various state courts that allowing judgment creditors to execute on choses in action against themselves violates plaintiffs’ right of access to the courts.<sup>116</sup> So far, the Court of Appeals of Texas is the only court to have accepted that argument, reasoning that when a litigant is divested of a claim, she loses standing to appear in court and her claim is extinguished, effectively depriving her of that right.<sup>117</sup> The Supreme Court of Utah, on the other hand, has held that the right to appear in court is not a personal right of the individual; rather, it is a right that is vested in the person who holds the chose in action.<sup>118</sup> Thus, when a chose in action is transferred, the right of access to the courts transfers with

114. *Id.* at 1314 (quoting William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 341 (1997)).

115. *Id.* at 1311–12.

116. *See, e.g.,* Marantha Faith Ctr., Inc. v. Colonial Trust Co., 904 So. 2d 1004, 1009 (Miss. 2004) (refusing to consider the argument because it was not argued before the trial court).

117. *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306–07 (Tex. App. 1992). The claim and all rights attached to it would be extinguished because when a judgment creditor obtains choses in action against itself, “any justiciable controversy is extinguished.” *Id.* at 306. In contrast, when a third party purchases claims, he has the same incentive to litigate those claims as the former plaintiff. *See Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 762 (Tex. App. 1992). Justiciability is destroyed because the parties to the suit (i.e., the judgment creditor versus the judgment debtor) are no longer adverse, thus running afoul of the Case or Controversy Clause of the United States Constitution and the justiciability requirements of many states. U.S. CONST. art. III, § 2, cl. 1; *Hoffert v. Gen. Motors Corp.*, 656 F.2d 161, 165 (5th Cir. 1981) (“[W]here both litigants desire the same result, there can be no case or controversy within the meaning of Article III.”); *see also In re A.M.S.*, 277 S.W.3d 92, 97 (Tex. App. 2009) (“The test for constitutional standing in Texas requires that there (a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought.” (internal quotation marks omitted)). *But see, e.g., Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 695 (Mich. 2010) (“Michigan courts’ judicial power to decide controversies was broader than the United States Supreme Court’s interpretation of the art. III case-or-controversy limits on the federal judicial power because a state sovereign possesses inherent powers that the federal government does not.”).

118. *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 702–03 (Utah 2002). The court explained that choses in action and the rights associated with them are regularly transferred. *Id.* When a party purchases a chose in action, he steps into the shoes of the former plaintiff, and the former plaintiff’s rights are entirely cut off through a loss of standing. *Id.* The new plaintiff “has the right to determine the course and scope of the litigation of the claims purchased, including the right to move to dismiss the pending claims.” *Id.* at 703. For a thorough discussion of both *Applied Medical* and *Criswell*, see *infra* notes 178–89.

it.<sup>119</sup> Still, there is some validity to the argument that if a judgment creditor obtains a chose in action against itself, the chose in action and the corresponding right to appear in court is automatically extinguished because justiciability is destroyed,<sup>120</sup> thus violating a state's open courts clause.<sup>121</sup>

If an open courts clause acts to bar execution at all, it will only bar execution on claims at the trial court level.<sup>122</sup> This is because as a general rule, the right to an appeal is not constitutionally guaranteed.<sup>123</sup> Apparently, the only state constitution that provides that litigants are entitled a civil appeal of right is Utah's.<sup>124</sup> However, under Utah's case law, that section probably does not prohibit a judgment creditor from executing on a judgment debtor's choses in action because the right to appeal is vested in whoever holds the right to bring a claim, just like the right of access to the courts.<sup>125</sup>

Thus, there are several rights attached to choses in action that transfer with the chose in action when it is sold or otherwise changes hands.<sup>126</sup> However, there is some authority for the proposition that when a judgment creditor obtains a chose in action against itself the claim is extinguished along with its associated rights.<sup>127</sup> Which interpretation applies depends on how the forum state interprets its constitutional provisions.<sup>128</sup>

### III. JUDICIAL APPROACHES TO THE PROBLEM

There are only about twenty-five cases that have touched on the issue of whether a judgment creditor can obtain choses in action against itself to

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119. *Applied Med.*, 44 P.3d at 703.

120. *Criswell*, 843 S.W.2d at 306.

121. *Id.* at 306–07.

122. *MP Med. Inc. v. Wegman*, 213 P.3d 931, 936 (Wash. Ct. App. 2009).

123. See *Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (“This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a state to provide appellate review . . . .”); *MP Med.*, 213 P.3d at 936 (“MP Medical has no constitutional right to appeal in this case . . . .”).

124. UTAH CONST. art. VIII, § 5 (“Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause.”). Ironically, Utah is also one of the states that allows a judgment creditor to execute on choses in action against itself. See *Applied Med.*, 44 P.3d at 703.

125. So far, there is no binding Utah precedent considering this issue. One Utah litigant has argued that article eight, section five, bars a judgment creditor from executing on an appeal against itself, but the trial court rejected this argument outright. *Innnerlight, Inc. v. The Matrix Grp., LLC*, No. 060400775, 2007 WL 7210447, at \*2–3 (4th Jud. Dist. Ct. Utah Sept. 18, 2007) (error in spelling of “Innerlight” in original). The court cited *Applied Medical* in support of its holding and ruled that the claim “belongs to the claim holder.” *Id.* at \*3 (citing *Applied Med.*, 44 P.3d at 702–03).

126. *Applied Med.*, 44 P.3d at 702–03.

127. *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306–07 (Tex. Ct. App. 1992).

128. *Arizona v. Evans*, 514 U.S. 1, 9 (1995) (noting that state courts are free to interpret their constitutions as they see fit).

satisfy a judgment, and these are scattered across thirteen different jurisdictions.<sup>129</sup> Of the states that allow execution upon all choses in action, few have directly confronted the issue of whether a judgment creditor can execute on choses in action against itself and issued a clear ruling on how lower courts are to proceed. Most that have considered the issue have either done so from a slightly different procedural perspective,<sup>130</sup> decided the case

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129. See *Amphibious Partners LLC v. Redman*, 389 F. App'x 762 (10th Cir. 2010); *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070 (10th Cir. 2009); *FM Indus., Inc. v. Citicorp Credit Servs., Inc.*, 656 F. Supp. 2d 795 (N.D. Ill. 2009); *Heritage Corp. of S. Fla. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 01-003519-CIV, 2008 WL 4858244 (S.D. Fla. Nov. 10, 2008); *Tax Track Sys. Corp. v. New Investor World, Inc.*, No. 01 C 6217, 2006 WL 1648491 (N.D. Ill. June 6, 2006); *Everts v. Will S. Fawcett Co.*, 74 P.2d 815 (Cal. Ct. App. 1937) (abrogated by statute); *Meserve v. Superior Court*, 38 P.2d 453 (Cal. Ct. App. 1934) (same); *Donan v. Dolce Vita Sa, Inc.*, 992 So. 2d 859 (Fla. Dist. Ct. App. 2008); *Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303 (Iowa 1994); *Brenton Bros. v. Dorr*, 239 N.W. 808 (Iowa 1931); *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004 (Miss. 2006); *Baker v. Tullock*, 77 P.2d 1035, 1035 (Mont. 1938); *Brandstetter v. Boyd*, No. 54229, 2010 WL 4684450 (Nev. Nov. 12, 2010); *Crenshaw v. Conrad*, No. 49746, 2008 WL 6102109 (Nev. Sept. 12, 2008); *Criswell*, 843 S.W.2d 304; *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758 (Tex. App. 1992); *Commerce Sav. Ass'n v. Welch*, 783 S.W.2d 668 (Tex. App. 1989); *Applied Med.*, 44 P.3d 699; *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208 (Utah 1999); *Golden Meadows Props., LC v. Strand*, 241 P.3d 371 (Utah Ct. App. 2010); *Cosby v. Cazares*, No. 20091035-CA, 2010 WL 3795133 (Utah Ct. App. Sept. 30, 2010) (per curiam); *Innerlight*, 2007 WL 7210447; *MP Med. Inc. v. Wegman*, 213 P.3d 931 (Wash. Ct. App. 2009); *Paglia v. Breskovich*, 522 P.2d 511 (Wash. Ct. App. 1974); *Johnson v. Dahlquist*, 225 P. 817 (Wash. 1924).

130. The most common alternative procedural posture besides a challenge to a writ of execution is a challenge to a judgment creditor's motion for the outright assignment of the debtor's chose in action to the judgment creditor. See *Amphibious Partners*, 389 F. App'x at 762 ("We conclude that the district court's outright transfer of a chose in action alleging damages far in excess of the value of the judgment at issue was an abuse of discretion."); *Tax Track*, 2006 WL 1648491, at \*1 (refusing to assign a judgment debtor's chose in action against the judgment creditor to the judgment creditor); *Criswell*, 843 S.W.2d at 306 (holding that the trial court abused its discretion in ordering the turnover of plaintiff's choses in action against defendant because such a turnover extinguishes the cause of action); *Associated Ready Mix*, 843 S.W.2d at 762-63 (same); *Commerce Sav.*, 783 S.W.2d at 671 (holding that the trial court did not abuse its discretion in refusing to grant such a turnover order, but refusing to comment on the legality of such an order). Those courts that have considered such assignments have roundly condemned them, often in no uncertain terms. See, e.g., *Tax Track*, 2006 WL 1648491, at \*1 ("[S]uch an interpretation of the statute would result in the extinction of every appeal from an adverse judgment by an impecunious judgment debtor. This court will not interpret the statute that broadly, or reach such an absurd result."). Judge Lucero of the Tenth Circuit, writing for the majority in *Amphibious Partners*, 389 F. App'x at 767, makes clear that such attitudes are based, at least in part, on the lack of the "key safeguard" of a public execution sale. Thus, they are not quite on point for this Comment, which is only concerned with execution. However, because many of the concerns in the turnover or assignment contexts are applicable in the execution context, some of the arguments made in these cases are considered. See *Associated Ready Mix*, 843 S.W.2d at 763 (acknowledging that the trial court could have placed the choses in action in the hands of a receiver to be sold, but suggesting that placing the choses in action in the hands of a receiver who would then pursue them to their fullest value would be a more desirable procedure than a public auction).

on other grounds,<sup>131</sup> or issued unpublished opinions with little value as guides for future litigants or examples for other courts.<sup>132</sup> Consequently, there is a dearth of case law on the topic.

Of the jurisdictions that have confronted the issue, Washington and Utah have the most developed case law.<sup>133</sup> Washington vests the trial court with discretion to refuse to issue a writ of execution to prevent a judgment creditor from obtaining the opposing side of a lawsuit against itself if “the demands of justice to all parties can be reasonably satisfied.”<sup>134</sup> In contrast, Utah allows a judgment creditor to obtain both sides of a lawsuit using a writ of execution with a limited public policy exception for the execution and purchase of legal malpractice claims by lawyers.<sup>135</sup> By examining the cases from these jurisdictions and comparing them with cases from other jurisdictions where appropriate, one can gain insight into how courts have approached the problem and what factors have influenced their decisions.

#### A. Washington’s Discretionary Approach

Washington is the state with the longest history of cases dealing with this tactic, with the first reported instance of a judgment creditor executing on a chose in action against itself in 1924.<sup>136</sup> Washington’s execution statute is extremely broad and allows execution on “[a]ll property, real and

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131. See, e.g., *RMA Ventures*, 576 F.3d at 1076. In *RMA Ventures*, the court upheld the validity of the execution sale, in part because plaintiff failed to challenge the writ of execution at the proper time. *Id.* It should be noted, however, that the court’s decision was also based on the fact that Utah law allows a judgment debtor to execute upon choses in action against itself. See *id.* at 1075.

132. Nevada is a prime example of this. See *Brandstetter*, 2010 WL 4684450, at \*1 (defendant validly purchased plaintiff’s cause of action and appeal against defendant to satisfy the same judgment under review on appeal); *Crenshaw*, 2008 WL 6102109, at \*1 (same). From these orders it is clear that Nevada, as a practical matter, allows execution by a judgment creditor upon choses in action against itself. However, a litigant can cite no precedent from within the state that is directly on point, because Nevada does not allow citation to unpublished opinions. See NEV. SUP. CT. R. 123. Interestingly, both of these cases cite a California opinion, *Denham v. Farmers Insurance Co.*, 262 Cal. Rptr. 146, 152 (Ct. App. 1989), in which a California appellate court interpreted Nevada Revised Statutes sections 21.080 and 10.045 as allowing a judgment creditor to execute upon a third party judgment debtor’s cause of action against his insurance company. See *Brandstetter*, 2010 WL 4684450, at \*1 n.1; *Crenshaw*, 2008 WL 6102109, at \*1. It seems odd that the Nevada Supreme Court would decline to interpret its own state’s statutes or at least explicitly adopt the California interpretation in a published opinion.

133. Washington has three cases directly on point. See *MP Med.*, 213 P.3d at 931; *Paglia*, 522 P.2d at 511; *Johnson*, 225 P. at 817. Utah has two Supreme Court cases, one decision in which the Tenth Circuit applied Utah law, two unpublished opinions, and one Court of Appeals opinion that touches on the issue. See *RMA Ventures*, 576 F.3d at 1076; *Applied Med.*, 44 P.3d at 701–02; *Tanasse*, 980 P.2d at 209; *Golden Meadows*, 241 P.3d at 374 (dicta); *Cosby*, 2010 WL 3795133, at \*2 (per curiam); *Innnerlight*, 2007 WL 7210447, at \*3.

134. *Paglia*, 522 P.2d at 513.

135. *Applied Med.*, 44 P.3d at 701–02.

136. *Johnson*, 225 P. at 817.

personal, of the judgment debtor that is not exempted by law.”<sup>137</sup> Although there are only three cases that confront the question of whether a judgment creditor can execute on choses in action against itself, no jurisdiction has more reported cases. Although Washington has now adopted a discretionary approach that appears to disfavor the tactic, the first cases in which the court confronted the tactic upheld its validity.<sup>138</sup>

In *Johnson v. Dahlquist*, the Supreme Court of Washington considered plaintiff’s appeal from the trial court’s denial of a motion to quash a writ of execution issued against plaintiff’s pending claim of debt against defendant.<sup>139</sup> The Supreme Court of Washington rejected the plaintiff’s argument that a writ of execution could not issue against claims that were unliquidated and undetermined, holding that Washington’s execution statute was “all inclusive” and therefore encompassed such claims.<sup>140</sup> The court then rejected plaintiff’s arguments that a defendant could not execute on claims against itself:

[I]t is contended that the respondents should not be permitted to levy upon that which they themselves owe to the judgment debtor. But why not? It is property. It is capable of being transferred. It is capable of being converted into a judgment which is subject to execution. It is an asset of the judgment debtor, and why should not his assets, whatever their nature, be taken to satisfy a judgment? We cannot see any logical reason why such property should not be levied on.<sup>141</sup>

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137. WASH. REV. CODE § 6.17.090 (2011). This particular version of statute was enacted in 1987. However, Washington has had almost identical execution statutes in force continuously since at least 1922. See WASH. REV. CODE § 6.04.060 (repealed 1987) (“[A]ll property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution.”); *Johnson*, 225 P. at 818 (citing REM. COMP. STAT. § 518 (1922)) (same). Washington has interpreted this statute to allow writs of execution to issue upon unliquidated tort claims whether they are assignable or not. *Woody’s Olympia Lumber, Inc. v. Roney*, 513 P.2d 849, 853–54 (Wash. Ct. App. 1973).

138. *Johnson*, 225 P. at 818.

139. *Id.* at 817. Plaintiff sued defendant over a debt and obtained a judgment for \$1700, and defendant appealed. *Id.* The case was remanded, and the appellate court entered a judgment for costs on appeal in favor of defendant. *Id.* To satisfy the judgment for costs, defendant sought a writ of execution against plaintiff’s remanded claim. *Id.*

140. *Id.* at 818. The court acknowledged that “[u]nder the common law, . . . choses in action were not subject to execution; but in most of the states, as here, the common law in this respect has been abrogated by statute.” *Id.* It held that the legislature was competent to make such property subject to levy and execution, and that it did so through Washington’s broadly drafted statute. *Id.*

141. *Id.* This paragraph is often quoted by courts in other jurisdictions. See, e.g., *Citizens State Bank of Des Moines v. Hansen*, 449 N.W.2d 388, 389–90 (Iowa 1989); *Brenton Bros. v. Dorr*, 239

With this decision, Washington was the first state to allow a judgment creditor to execute claims against itself.<sup>142</sup>

The Washington courts first adopted their current discretionary approach in *Paglia v. Breskovich*.<sup>143</sup> In this breach of contract case, defendant's attorney, Paglia, purchased a judgment against plaintiff from a judgment creditor in an unrelated action, obtained a general writ of execution against plaintiff's claims against defendant, and purchased those claims at the subsequent execution sale.<sup>144</sup> Plaintiff did not contest the writ of execution until after the sale took place and Paglia moved to substitute himself as plaintiff.<sup>145</sup>

The issue before the court of appeals was whether there was any equitable relief which the trial court could have invoked to set aside an execution sale "when the sale completely destroys the judgment debtor's ability to prosecute the independent cause of action."<sup>146</sup> The court noted that a more recent case from the Supreme Court of Washington, *United Pacific Insurance Co. v. Lundstrom*,<sup>147</sup> indicated a departure from *Johnson* because it overturned a writ of execution that issued against a judgment that was still contingent and uncertain even after it was entered and that apparently would have permitted a double recovery.<sup>148</sup> The *Paglia* court saw no difference between a judgment that was uncertain after it was entered and a claim that was uncertain because it had not yet been reduced to judgment, and

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N.W. 808, 813 (Iowa 1931); *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1009 (Miss. 2006) (concluding that Mississippi statutory law allows a defendant to levy upon a plaintiff judgment debtor's choses in action against the defendant to satisfy a judgment); *Marantha Faith Ctr., Inc. v. Colonial Trust Co.*, 904 So. 2d 1004, 1009 (Miss. 2004) (quoted in support of the court's holding that choses in action are subject to execution).

142. *Johnson*, 225 P. at 818.

143. 522 P.2d 511 (Wash. Ct. App.), *rev. denied* 84 Wash. 2d 1004 (1974).

144. *Id.* at 511–12. Paglia's cleverness and sheer audacity is worth acknowledging. Paglia first purchased one judgment against plaintiff, obtained a writ of execution against the plaintiff's claims, and purchased them for \$750. *Id.* at 512. He then attempted to fire plaintiff's attorney and moved to substitute himself as plaintiff. *Id.* Plaintiff moved to set aside the execution sale. *Id.* In its ruling on the plaintiff's motion, the trial court allowed the plaintiff fourteen days to come up with sufficient funds to satisfy the judgment before it would uphold the sale. *Id.* Plaintiff did so, borrowing the money, and returned triumphantly to inform the court. *Id.* However, in the interim, Paglia had purchased *another* outstanding judgment against the plaintiff (there were three outstanding judgments against the plaintiff totaling roughly \$20,000) and obtained a second writ of execution for the plaintiff's claims. *Id.* Paglia bought the claims again and filed a second motion to substitute. *Id.* The plaintiff had exhausted his resources and could not pay, so this second motion is the one the trial court ultimately ruled on. *Id.* Paglia was honest about his aims: "We are intending to take away their ability to prosecute the action. I mean make no mistake about it." *Id.* (quoting the record on appeal).

145. *Id.* at 514. The trial court granted the motion to substitute even though it was "obviously distressed at its inability to grant any type of equitable relief which [plaintiff] sought." *Id.* at 512.

146. *Id.* at 513.

147. 459 P.2d 930, 936 (Wash. 1969).

148. *Paglia*, 522 P.2d at 514.

concluded that the *Lundstrom* court was trying to avoid a grossly inequitable result.<sup>149</sup>

The *Paglia* court reasoned that “[e]ither the *Johnson* rule has been or ought to be discarded, or else the court ought to exercise its supervisory power over its own process to prevent one party from obtaining control and management of both ends of one lawsuit.”<sup>150</sup> The court acknowledged that the judgment debtor failed to contest the writ of execution prior to the sale, but held that “[i]f a trial court can exercise its inherent powers to prevent the likely development of a grossly inequitable result, a fortiori, it ought to be able to exercise the same powers after the inequitable situation develops.”<sup>151</sup> This power is “exercisable when the demands of justice to all parties can be reasonably satisfied.”<sup>152</sup> Thus, the court of appeals reversed the decision of the trial court, denying *Paglia*’s motion to substitute himself as plaintiff and granting the plaintiff’s motion to set aside the execution sale.<sup>153</sup>

149. *Id.* The court also acknowledged that a somewhat different interpretation of *Lundstrom* appears in *Woody’s Olympia Lumber, Inc. v. Roney*, 513 P.2d 849, 852 (Wash. 1973). *Paglia*, 522 P.2d at 514 n.2. In *Woody’s*, the Supreme Court of Washington held that an unliquidated tort claim is subject to execution. *Woody’s*, 513 P.2d at 853–54. It interpreted *Lundstrom* as holding that a claim is subject to levy and execution if it is capable of being rendered mathematically certain when judgment is entered. *Id.* at 852.

150. *Paglia*, 522 P.2d at 514. The court cited *Brenton Bros. v. Dorr*, 239 N.W. 808, 810 (Iowa 1931), in which the Iowa Supreme Court, faced with a judgment creditor attempting to execute upon a judgment debtor’s counterclaim against the judgment creditor, held that a court may grant a reasonable stay of execution if the applicant for the stay can show that execution would prejudice him in independent proceedings. *Paglia*, 522 P.2d at 514. Iowa has faced the issue at least once more since *Brenton Bros.* In *Chrysler Credit Corp. v. Rosenberger*, the Iowa Supreme Court considered whether the trial court erred in denying the plaintiff judgment debtor’s request for a stay of execution against its choses in action against the judgment creditor. 512 N.W.2d 303, 305 (Iowa 1994). The court reiterated that the trial court has discretion to grant a stay, and its decision will not be disturbed unless “the discretion is capriciously exercised or abused.” *Id.* (internal quotation marks omitted). The court found it significant that if the judgment debtor was allowed to pursue her claims she may ultimately lose and exhaust the value of the claims in the process, leaving no value for the judgment creditor to recover. *Id.* Also, the court reasoned, the judgment creditor will receive some value in the transaction, in the form of a reduction in the amount of the judgment against her. *Id.*

151. *Paglia*, 522 P.2d at 514.

152. *Id.* at 513.

153. *Id.* Chief Judge Pearson joined in the majority opinion, but wrote a separate concurring opinion to discuss a few additional reasons for reversal. *Id.* at 515. In light of *Paglia*’s position as the defendant’s attorney, Judge Pearson wrote that “[p]ublic policy should not condone the action of counsel for one party to a lawsuit in acquiring ownership of the interest . . . of the client’s adversary” and that such actions are “specifically prohibited by the Code of Professional Responsibility, CPR 5, DR 5-103(A).” *Id.* He continued:

Furthermore, if the attorney acquires such interest of his client’s adversary for the sole purpose of winning the lawsuit by means other than on the merits, the action borders on abuse of legal process. . . . This is particularly true where a great disparity exists between



*Paglia*'s holding appears to have gained a foothold in the Washington appellate courts, as evidenced by *MP Medical Inc. v. Wegman*.<sup>154</sup> In that case, plaintiff sued defendants—plaintiff's former employee and his new employer—for various claims arising out of the employee's departure.<sup>155</sup> The trial court entered a judgment on the merits and a supplemental judgment for attorney's fees in favor of the defendants.<sup>156</sup> Plaintiff, now a judgment debtor, appealed from both the merits judgment and the award of attorney's fees but failed to file a supersedeas undertaking to stay enforcement of the judgment.<sup>157</sup> Defendant sought a writ of execution against plaintiff's appeal, and the trial court issued the writ over plaintiff's timely objections.<sup>158</sup> The Court of Appeals of Washington granted immediate review of the decision to issue the writ and the merits determination.<sup>159</sup>

The court confronted defendant's argument that *Johnson* makes clear that a judgment creditor can execute on claims against itself.<sup>160</sup> It explained that *Paglia* represents an exception to the rule laid down in *Johnson*.<sup>161</sup> *Paglia* stands for the proposition that "allowing one party to control both sides of the lawsuit [is] 'grossly inequitable' because the judgment debtor would be deprived of the opportunity to establish his claim."<sup>162</sup> The court held that defendants could not execute on plaintiff's cause of action to satisfy their judgment for attorney's fees, and that the trial court should have exercised control over its own process to avoid such an unjust result:

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the potential value of the cause of action levied upon as compared with the amount of the judgment debt.

*Id.* (citation omitted).

154. 213 P.3d 931 (Wash. Ct. App. 2009). *Paglia* has also been accepted by Florida courts. *Donan v. Dolce Vita Sa, Inc.*, 992 So. 2d 859, 861 (Fla. Dist. Ct. App. 2008); *see also* *Heritage Corp. of S. Fla. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 01-003519-CIV, 2008 WL 4858244 (S.D. Fla. Nov. 10, 2008) (refusing to issue a writ of execution against a judgment debtor's chose in action). Florida does not allow execution on personal injury claims, but breach of contract claims like the one in *Donan* are ordinarily subject to execution. *Donan*, 992 So. 2d at 861. However, when the judgment creditor in *Donan* tried to execute on the judgment debtor's appeal through supplementary proceedings, the court stated: "This is a case of first impression in Florida and we, like the trial court, are persuaded by the Washington Court's opinion in *Paglia*." *Id.*

155. *MP Med.*, 213 P.3d at 933–34. Plaintiff's claims were for breach of contract, tortious interference with a business relationship, tortious interference with a contractual relationship, and trade secret violations. *Id.* at 934.

156. *Id.* at 933–34.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 935.

161. *Id.* at 935–36.

162. *Id.* at 936.

[W]e do not agree with *Paglia*'s suggestion that the *Johnson* rule has been discarded.<sup>163</sup> But we do agree with *Paglia* that the trial court has supervisory authority over its own process and should exercise that power to prevent the grossly inequitable situation where one party destroys the opposing party's cause of action by becoming the owner of the cause of action under review. . . . While *MP Medical* has no constitutional right to appeal in this case, allowing one party to destroy the opposing party's appeal by becoming its owner through enforcement of the very judgment under review is fundamentally unjust. The trial court erred when it failed to exercise its inherent power to prevent this from happening.<sup>164</sup>

The court then turned to the trial court's decision on the merits and the award of attorney's fees, affirmed both, and awarded defendants additional attorney's fees and costs for the appeal.<sup>165</sup> Even though the plaintiff's appeal was unsuccessful on the merits, *MP Medical* is significant in that the court of appeals reaffirmed its commitment to *Paglia* and refused to allow a writ of execution to issue against plaintiff's choses in action against defendant.

Thus, from these cases it is clear that Washington generally allows writs of execution to issue on choses in action.<sup>166</sup> However, when a judgment creditor seeks to execute on a claim against itself in order to gain control of both sides of a lawsuit and extinguish the claim, a Washington court is to exercise its authority over its own process to prevent an inequitable result.<sup>167</sup>

#### B. *Utah's Bright-Line Rule*

Utah's bright-line rule starkly contrasts with Washington's discretionary approach in that it allows judgment creditors to execute on a claim against themselves regardless of the circumstances of the case.<sup>168</sup> There is only one

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163. To clarify, *Paglia* suggested, but did not determine, that the *Johnson* rule had been discarded; rather, it determined that it was one of two possible interpretations of *Lundquist*, and the less likely one at that. *Paglia v. Breskovich*, 522 P.2d 511, 514 (Wash. 1974). The second possible interpretation, according to *Paglia*, was that *Lundquist* meant that a trial court could use its inherent power over its own process to avoid an inequitable result. *Id.* The *Paglia* court determined that the second interpretation was more likely the correct one. *Id.*

164. *MP Med.*, 213 P.3d at 936 (internal footnotes omitted).

165. *Id.* at 941.

166. *See Johnson v. Dahlquist*, 225 P. 817 (Wash. 1924).

167. *See MP Med.*, 213 P.3d at 936; *see also Paglia*, 522 P.2d at 514.

168. *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 701–02 (Utah 2002); *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 209 (Utah 1999); *see also UTAH R. CIV. P.* 69A(c) (the

exception to Utah's rule: based on public policy, attorneys and law firms may not execute on legal malpractice claims against themselves.<sup>169</sup>

The Utah Supreme Court created the legal malpractice exception in the same case in which it first encountered the tactic: *Snow, Nuffer, Engstrom & Drake v. Tanasse*.<sup>170</sup> In *Tanasse*, the judgment creditor—a law firm that obtained a default judgment against its former client for unpaid legal fees—obtained a writ of execution upon the client's legal malpractice claim filed in a separate lawsuit against the law firm and purchased the claims at the subsequent sale.<sup>171</sup> The client filed a motion to set aside the sale, which was denied by the trial court and affirmed by the court of appeals.<sup>172</sup> The Utah Supreme Court agreed with the court of appeals “that a legal malpractice claim can be reached through an involuntary transfer such as execution.”<sup>173</sup> The court went a step further, holding that Utah's “writ of execution rules are quite broad and, absent legislative proscription, encompass unliquidated tort claims, including legal negligence actions.”<sup>174</sup> However, the court ultimately reversed the court of appeals's decision because allowing a law firm to execute on the client's claims against it would violate public policy.<sup>175</sup> It explained:

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officer of the court may seize and sell intangible personal property of the judgment debtor); *Tanasse*, 980 P.2d at 209 (citing *former* UTAH R. CIV. P. 69(f) (repealed 2004)) (“The officer must execute the writ [of execution] against the non-exempt property of the judgment debtor by levying on a sufficient amount of property, if there is sufficient property; collecting or selling the *choses in action* and selling the other property in the manner set forth herein.” (emphasis added)). Though *former* Utah Rule 69(f) was repealed in 2004 and the new statutes do not explicitly mention choses in action, see Rule 69A, the new Rule allows execution on “intangible property” and Utah courts continue to allow execution on choses in action. See, e.g., *Cosby v. Cazares*, No. 20091035-CA, 2010 WL 3795133 (Utah Ct. App. Sept. 30, 2010); *Golden Meadows Props., LC v. Strand*, 241 P.3d 371 (Utah Ct. App. 2010); *Innerlight, Inc. v. The Matrix Grp., LLC*, No. 060400775, 2007 WL 7210447 (4th Jud. Dist. Ct. Utah Sept. 19, 2007) (“[T]he Court finds that the Writ's inclusion of choses of action as part of Defendant's property is appropriate.”). There are no decisions citing the new statute, and the new decisions all rely on pre-2004 precedent. See, e.g., *Innerlight*, 2007 WL 7210447, at \*3 (citing *Applied Med.*, 44 P.3d at 702–03).

169. *Tanasse*, 980 P.2d at 210.

170. *Id.* at 209.

171. *Id.*

172. *Id.*

173. *Id.* at 210.

174. *Id.* at 210–11 (referencing *former* UTAH R. CIV. P. 69(f) (repealed 2004)).

175. *Id.* at 211. Note that it is not the issuance of a writ of execution against legal malpractice claims that violates public policy, but the execution and purchase of those claims *by the defendant law firm*. See *id.* at 210, 212. Similarly, Nevada has a public policy exception that prevents any person from asserting a legal malpractice claim that “has been transferred by assignment or by levy and execution sale but was never pursued by the original client.” *Chaffee v. Smith*, 645 P.2d 966, 966 (Nev. 1982). However, the Nevada Supreme Court reserved judgment in *Chaffee* as to whether a legal malpractice claim that has been asserted can be transferred. *Id.* Illinois also recognizes this limited public policy exception and does not allow execution on unfilled legal malpractice claims because, based on the personal nature of legal malpractice claims, they are not subject to assignment. *Christison v. Jones*, 405 N.E.2d 8, 9–11 (Ill. App. Ct. 1980) (holding that the “bare right to file a cause of action for legal malpractice” was not subject to execution); cf. *Gonzalez v. Profile Sanding*

The acquisition of this legal malpractice claim by Snow Nuffer creates two problems. First it has the effect of denying Tanasse the right to a trial on his claims [in violation of the Utah constitution's open courts clause]. Snow Nuffer obviously has no intention to litigate a claim against itself . . . .

Second, the appropriate value of the legal malpractice claim will never be fairly determined. . . . Snow Nuffer, whose incentives are in favor of under-valuation, purchased the claim and assigned it the value of \$10,000. . . . Tanasse's claim against Snow Nuffer was predicated on a \$102,000 judgment entered against him in a wrongful eviction case. Tanasse's [legal malpractice] cause of action could be worthless. On the other hand, it could be of substantial value. If we allow Snow Nuffer's actions to stand, the true value of the action will never be determined, and yet Tanasse will remain liable not only for the judgment he claims was caused by Snow Nuffer's negligence but also for the deficiency judgment on the execution.<sup>176</sup>

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Equip., Inc., 776 N.E.2d 667, 680 (Ill. App. Ct. 2002) (denying motion for turnover of unfiled legal malpractice claims) ("Obviously, if the legislature opted to include 'potential chose' in the list of possible assets, it would have done so. It did not, and we cannot read that condition into the statute."). However, there is authority supporting the proposition that, under Illinois law, once a legal malpractice claim is filed it may be subject to execution. *FM. Indus., Inc. v. Citicorp Credit Servs., Inc.*, 656 F. Supp. 2d 795, 799–800 (N.D. Ill. 2009), *aff'd*, 614 F.3d 335 (7th Cir. 2010) (applying Illinois law) (holding that the defendant attorney could execute upon a judgment debtor's currently pending legal malpractice claims against defendant to satisfy a judgment).

176. *Tanasse*, 980 P.2d at 211–12 (citations omitted). The second policy reason, the "value argument," is a common argument in cases where a judgment creditor attempts to execute on choses in action against himself, which some courts appreciate and some dismiss outright. *Compare* *Paglia v. Breskovich*, 522 P.2d 511, 515 (Wash. Ct. App. 1974) (Pearson, C.J., concurring) ("This is particularly true where a great disparity exists between the potential value of the cause of action levied upon as compared with the amount of the judgment debt."), *and* *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1077 (10th Cir. 2009) (Lucero, J., concurring) ("[T]he actual value of a claim purchased by an opponent at auction will never be fairly determined."), *with* *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1010 (Miss. 2006) (rejecting plaintiff's argument that the value of its choses in action against the defendant could only be determined by a trial, stating that the "value—for purposes of levy and execution—is determined at a sheriff's execution sale."). The argument has been more successful in cases where the outright assignment of a chose in action is at issue and no execution sale has or will take place. *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 762 (Tex. App. 1992) (in a non-execution context, relying on the "value argument" in support of its holding that disallowed turnover of plaintiff's choses in action against defendant); *Commerce Sav. Ass'n v. Welch*, 783 S.W.2d 668, 671 (Tex. App. 1989) (same, stating "Welch's cause of action against Commerce could conceivably be worthless. On the other hand, it could be of considerable value. Commerce's strategy sought to preclude any determination of Welch's rights against it in the lawsuit now pending in federal

The court recognized that this reasoning would apply when a judgment creditor attempts to acquire *any* unliquidated tort claim against itself not yet reduced to judgment, but it noted that “these problems take on special significance” in the context of the attorney-client relationship.<sup>177</sup>

The case that conclusively established Utah’s general policy of allowing judgment creditors to execute upon choses in action against themselves was *Applied Medical Technologies, Inc. v. Eames*.<sup>178</sup> In *Applied Medical*, defendant sought to execute on the plaintiff’s claims to satisfy a deficiency judgment it obtained against plaintiff in a prior foreclosure proceeding.<sup>179</sup> The trial court issued a writ of execution against the claims, and defendant purchased the claims at the sheriff’s sale.<sup>180</sup> Both plaintiff’s trustee and attorney attended the sale but did not bid.<sup>181</sup> Defendant then moved to dismiss the claims, and the trial court granted the motion over plaintiff’s protests.<sup>182</sup>

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court.”); *see also* *Amphibious Partners LLC v. Redman*, 389 F. App’x 762, 766 (10th Cir. 2010) (in reversing the district court’s outright assignment of plaintiff’s chose in action against defendant to defendant, noting that “the Redmans contend their chose [in action] is worth \$2.6 million, yet it was extinguished to satisfy a judgment of less than one twentieth of that total.”). Finally, this rationale is the reason the California legislature ended the practice of execution on choses in action in 1941. *Dehnham v. Farmers Ins. Co.*, 262 Cal. Rptr. 146, 152 (Ct. App. 1989).

177. *Tanasse*, 980 P.2d at 212. The court explained further, that “[a]lthough such a practice may be acceptable in cases not involving legal malpractice claims, we believe public confidence in both the legal profession and the legal process as a whole would be damaged if lawyers were allowed to execute on legal malpractice claims brought against them.” *Id.* The court declined to reach the issue of whether such practice is appropriate outside the legal malpractice context. *Id.* at 212 n.3. Justice Zimmerman, concurring and dissenting, agreed with the reasoning of the majority on all points except the scope of the prohibition. *Id.* at 212–13 (Zimmerman, J., concurring and dissenting). He advocated for “forbidding a lawyer to execute on a malpractice cause of action against that lawyer unless it is the only remaining asset of the debtor.” *Id.* at 213. He continued: “Such a rule would be sufficient to preclude a lawyer from finding a way to execute upon and extinguish a cause of action against that lawyer when the client had other assets available to satisfy the debt owed—the abusive possibility that seems to underlie the majority’s rule.” *Id.* He worried that the majority’s rule would “only serve to give the debtor additional and unjustified leverage over the lawyer in trying to settle such a suit for more than it is objectively worth.” *Id.* This potential solution is attractive if broadened beyond the context of a lawyer acquiring legal malpractice claims against himself and applied to execution upon all claims, although it also has its potential pitfalls. *See infra* notes 306–09, 340–44 and accompanying text.

178. 44 P.3d 699 (Utah 2002).

179. *Id.* at 700. The facts of this case are fairly complex. *Applied Medical*, the judgment creditor, was formed by several of the parties to the lawsuit. *Id.* One of them, Mr. Eames, gave his shares in the company to his family trust, administered by his wife. *Id.* Another stockholder, Dr. Hill, initiated the foreclosure action against the trust in which the deficiency judgment was entered, and no appeal was taken from the judgment. *Id.* Several years later, the trust sued *Applied Medical* over claims regarding the trust’s stock, and *Applied Medical*, as the trust’s judgment creditor, sought to execute on the trust’s claims against itself. *Id.*

180. *Id.*

181. *Id.* at 701.

182. *Id.*

The court began by reiterating that, under Utah law, choses in action are subject to execution and that “judgment creditors can purchase any nonexempt property at a sheriff’s sale to satisfy the judgment that it has against the judgment debtor,” including claims against the judgment creditors themselves.<sup>183</sup> It then rejected plaintiff’s argument that the tactic violated Utah’s open courts clause.<sup>184</sup> The court acknowledged that “[a]t the very least, the open courts provision guarantees litigants access to the courts, i.e., a day in court, affording them the opportunity to litigate any justiciable controversy.”<sup>185</sup> However, the court explained that the right is “inextricably connected with that claim,” and if that claim is transferred, the right to a day in court transfers with it.<sup>186</sup> In addition, when a claim is transferred—whether to the defendant or a third party—the result is the same: the former owner of the claims loses the right to pursue those claims.<sup>187</sup> For this reason, the court saw no “difference between a defendant purchasing claims against itself and another purchasing those claims.”<sup>188</sup> Therefore, the court held that the execution sale and the subsequent motion to dismiss did not violate the Utah constitution.<sup>189</sup>

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183. *Id.* at 702.

184. *Id.* Utah’s open courts clause provides:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

UTAH CONST. art. I, § 11.

185. *Applied Med.*, 44 P.3d at 702.

186. *Id.* The court found it significant that “[i]ndeed, causes of action are regularly sold.” *Id.* It explained that once a claim is transferred, the new owner has all the rights of the former owner related to the claim, including “the right to determine the course and scope of the litigation of the claims purchased . . . [and] the right to move to dismiss the pending claims.” *Id.* at 703.

187. *Id.*

188. *Id.* The court also noted that “the last clause of the open courts provision guarantees that an individual may ‘prosecut[e] or defend[ any civil action] before any tribunal in this State,’ so long as the individual is a party to the suit.” *Id.*

189. *Id.* Of course, not all states interpret their open courts clauses in the same way as Utah. For example, in *Criswell v. Ginsberg & Foreman*, the Court of Appeals of Texas held that Texas’s open court clause prohibited a judgment creditor from using Texas’s turnover statute to obtain an opponent’s chose in action against the judgment creditor to satisfy a judgment. 843 S.W.2d 304, 306–07 (Tex. App. 1992). Texas has a much simpler open court clause than Utah, which reads: “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” TEX. CONST. art. I, § 13. The court interpreted this section to mean that a litigant enjoys a specific guarantee of a right to access the courts that the legislature cannot arbitrarily or unreasonably interfere with. *Criswell*, 843 S.W.2d at 306. The court reasoned that Texas’s execution statute interferes with that right when a judgment creditor executes on a judgment debtor’s chose in action against the judgment creditor itself:

The court then turned to plaintiff's argument that the public policy considerations in *Tanasse* were equally applicable to the present situation and should therefore be extended to preclude all judgment creditors from purchasing claims against themselves at an execution sale.<sup>190</sup> The court pointed out that *Tanasse* explicitly limited its holding to attorneys because of concerns about undermining the attorney-client relationship and refused to extend the public policy exception to all judgment creditors.<sup>191</sup> Finally, the court held that the execution sale was valid and affirmed the trial court's decision to grant defendant's motion to dismiss.<sup>192</sup>

Another case decided under Utah law is of interest because it comes from the highest court to rule on the issue thus far. In *RMA Ventures California v. SunAmerica Life Insurance Co.*, the Court of Appeals for the

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When a judgment debtor's cause of action against his judgment creditor is turned over to the judgment creditor, the judgment creditor becomes the holder of a cause of action against himself. The judgment creditor becomes both plaintiff and defendant. Under such circumstances, any justiciable controversy is extinguished. Thus, the judgment debtor is forever deprived of his day in court on that cause of action without receiving any value in return for it.

*Id.* The court ruled that in this situation, the Texas execution statute arbitrarily and unreasonably interfered with the judgment debtor's right to pursue the action and it was therefore unconstitutional as applied. *Id.* at 307. The Texas court did not explicitly consider the arguments the Utah Supreme Court articulated in *Applied Medical* regarding how transfers of choses in action indicate that a right of action is not an inalienable individual right and that changes of parties are possible, even common. *See id.* at 304–07. A further difference between the cases exists in that *Criswell* dealt with the turnover of plaintiff's choses in action, while *Applied Medical* dealt with execution on them. Compare *id.* at 305, with *Applied Med.*, 44 P.3d at 700.

190. *Applied Med.*, 44 P.3d at 703–04.

191. *Id.* The court noted that lawyers are officers of the court who have an advantage over their clients based on their knowledge of the potential risks and rewards of litigation and their knowledge of confidential information about their clients. *Id.* at 703. Therefore, lawyers are in a position to take advantage of the client if they are allowed to purchase a legal malpractice claim against themselves then move to dismiss those claims. *Id.* The court argued that this sort of behavior would undermine public confidence in the system, and the court had “a constitutional duty to regulate and supervise the actions of attorneys in the practice of law.” *Id.* at 704. Therefore, the exception as applied to attorneys was proper. *Id.*

192. *Id.* The Utah courts have not issued a reported ruling on the issue since *Applied Medical*; however, there are three recent decisions from that state's courts showing its continuing commitment to *Applied Medical*'s principles. The first, *Cosby v. Cazares*, is an unreported opinion in a probate case in which the Court of Appeals of Utah upheld the trial court's grant of summary judgment that transferred the defendant's claim against the estate of one of plaintiff's relatives that was the subject of the probate judgment. No. 20091035-CA, 2010 WL 3795133, at \*1–2 (Utah Ct. App. Sept. 30, 2010) (per curiam), *cert denied*, 247 P.3d 774 (Utah 2011). In the second case, *Golden Meadows Properties, LC v. Strand*, the Court of Appeals of Utah reiterated that a judgment creditor may execute on choses in action against itself under Utah law but declined to entertain the judgment debtor's arguments to the contrary because it decided the appeal on the merits, mooted the issue for that case. 241 P.3d 371, 374 (Utah Ct. App. 2010), *cert denied*, 247 P.3d 774 (Utah 2011). Finally, the Fourth Judicial District Court of Utah in *Innnerlight, Inc. v. The Matrix Group, LLC*, allowed a judgment creditor to execute on a judgment debtor's appeal in 2007, holding that such an execution did not violate the judgment debtor's constitutional right to an appeal under the Utah Constitution. No. 060400775, 2007 WL 7210447, at \*2, \*3 (4th Jud. Dist. Ct. Utah Sept. 19, 2007). *See supra* notes 122–25 and accompanying text.

Tenth Circuit considered whether under Utah law a judgment creditor could execute on the judgment debtor's appeal to satisfy a supplemental judgment for attorney's fees based on the same judgment from which the appeal was taken.<sup>193</sup> The district court granted summary judgment in favor of defendants, the judgment creditors, and plaintiff appealed the judgment on the merits.<sup>194</sup> Defendants requested, and were granted, a supplemental judgment for attorney's fees against plaintiff, which plaintiff did not appeal.<sup>195</sup> Defendants then obtained a writ of execution against plaintiff's underlying cause of action and plaintiff's right to appeal from the judgment on the merits.<sup>196</sup> Plaintiff objected, filing a motion to stay or quash the writ of execution.<sup>197</sup> The district court denied the motion, and plaintiff once again failed to appeal from that adverse ruling.<sup>198</sup> Defendants purchased the appeal and cause of action for \$10,000 at the execution sale, and then moved to dismiss the merits appeal pending before the court of appeals.<sup>199</sup> Only then did the plaintiff contest the writ.<sup>200</sup>

The court of appeals concluded that the execution sale was valid because plaintiff lacked standing to pursue the appeal as a result of the sale.<sup>201</sup> The court "recognize[d that] the circumstances of this case present[ed] a degree of discomfort" because if the judgment on the merits was reversed, the judgment for attorney's fees would fall as well.<sup>202</sup> Nevertheless, the court refused to consider the plaintiff's arguments against the sale's lawfulness "[b]ecause [the p]laintiff did not appeal the district court's decision allowing the execution sale to proceed."<sup>203</sup>

193. 576 F.3d 1070, 1071 (10th Cir. 2009). The court considered whether choses in action were subject to execution under Utah law pursuant to Federal Rule of Civil Procedure 69(a)(1), which mandates that federal courts apply the execution procedure of the state in which the district court sits. *Id.* at 1074. See *supra* note 53 and accompanying text.

194. *RMA Ventures*, 576 F.3d at 1072. Plaintiff's claims were for breach of contract and misrepresentation, arising out of defendant's failure to implement a reduction in interest rate in accordance with a mortgage agreement between the parties. *Id.* at 1071–72.

195. *Id.* at 1072.

196. *Id.*

197. *Id.* It turned out to be significant that although "[p]laintiff raised various jurisdictional and due process arguments before the district court," plaintiff "never alleged an inability to pay the judgment of attorneys' fees or post a supersedeas bond." *Id.* at 1072, 1076; see also *id.* at 1077 (Lucero, J., concurring).

198. *Id.* at 1072 (majority opinion).

199. *Id.*

200. *Id.* at 1072–73.

201. *Id.* at 1075.

202. *Id.*

203. *Id.* at 1076. The court cited authority for the proposition that a writ of execution is not subject to collateral attack. *Id.* (citing *Edmonston v. Sisk*, 156 F.2d 300, 302 (10th Cir. 1946)). The



The majority opinion of *RMA Ventures* adds nothing to the development of Utah law, as the court was required to faithfully apply Utah’s law to the case before it.<sup>204</sup> However, Judge Carlos Lucero’s concurring opinion leveled pointed criticism at the Utah approach.<sup>205</sup> He began: “It is with considerable understatement that the majority acknowledges the ‘degree of discomfort’ presented by this case. While I am constrained to agree that we must dismiss, I am troubled by the manner in which SunAmerica has extinguished RMA’s right to a merits appeal.”<sup>206</sup> In part, Judge Lucero was concerned with the same thing as the majority; namely, that the judgment creditor executed on the appeal to satisfy a supplemental judgment entirely dependent on the validity of the merits judgment from which the appeal was taken.<sup>207</sup> He also raised a second concern:

As a matter of public policy, I doubt the wisdom of a rule that readily places the right to appeal on an auction block. More troublesome still is a rule permitting a defendant to purchase its opponent’s appellate rights, thereby extinguishing a plaintiff’s claim. . . . Today’s decision thus incentivizes Utah defendants to attempt an end run around merits determinations by purchasing a plaintiff’s right to appeal. This incentive is at its zenith when it is most offensive—in those cases in which a defendant believes it would likely lose the merits appeal.<sup>208</sup>

Judge Lucero noted that allowing execution on an appeal to satisfy the same judgment under review is even more disconcerting than allowing execution on a chose in action to satisfy a judgment in an unrelated action.<sup>209</sup> However, he ultimately agreed with the majority that the sale was valid because Utah law allows judgment creditors to execute on causes of action

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court continued, noting that the “[p]laintiff had numerous opportunities to avoid this outcome.” *Id.* The plaintiff could have (1) appealed the award for attorney’s fees, (2) paid the judgment, or (3) filed a supersedeas bond, which it never argued it was unable to pay. *Id.* This illustrates the importance of challenging a writ of execution at the proper time and using the proper procedure. That being said, in *Paglia v. Breskovich*, a Washington court faced the same dilemma—the plaintiff had not properly attacked the writ of execution—and the court still vacated the writ of execution. 522 P.2d 511, 514 (Wash. Ct. App. 2009).

204. See FED. R. CIV. P. 69(a)(1).

205. *RMA Ventures*, 576 F.3d at 1076–77 (Lucero, J., concurring).

206. *Id.* at 1076.

207. *Id.* at 1076–77. His subsequent articulation demonstrates the circularity of this situation well: “We cannot reach the merits of this appeal if we grant the motion to dismiss, but we cannot know whether the motion to dismiss is well-taken unless we reach the merits.” *Id.* at 1077.

208. *Id.* Judge Lucero also made the value argument, discussed *supra* note 176. He argued that “the actual value of a claim purchased by an opponent at auction will never be fairly determined.” *Id.* The claim executed on was for \$950,000, and the judgment creditor paid a mere \$10,000. *Id.*

209. *Id.*

against themselves, and plaintiff failed to take steps that would have stayed the execution sale.<sup>210</sup>

In sum, Utah's bright-line rule allows a defendant to obtain a writ of execution on choses in action against itself and to purchase those choses in action at an execution sale.<sup>211</sup> There is only one small exception: public policy forbids an attorney or law firm from purchasing the legal malpractice claims of a former client against itself.<sup>212</sup> Apart from this extremely narrow exception, choses in action are "fair game."

#### IV. THE SUPERIORITY OF WASHINGTON'S DISCRETIONARY APPROACH OVER UTAH'S BRIGHT-LINE RULE, THE INTERESTS AT STAKE, AND THE PROPOSED SOLUTION

##### A. *Bright-Line Rules Versus Sound Discretion*

The question is: which approach, Washington's or Utah's, is better? As the foregoing Part suggests, the law surrounding whether a judgment creditor can execute on choses in action against itself is still fairly undeveloped. Courts' reasons for allowing or not allowing a defendant judgment creditor to execute on claims against itself vary widely or, worse, remain unarticulated.<sup>213</sup> The primary reason for this is probably because there are very few examples of cases in which judgment creditors actually attempt to execute on choses in action against themselves.<sup>214</sup>

What is clear is that the judgment debtor, the judgment creditor, and society as a whole have legitimate interests at stake, and that the strength of those interests relative to one another varies based on the facts and

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210. *Id.*

211. *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 704 (Utah 2002).

212. *Id.*

213. The best example of this is the Nevada Supreme Court, which has issued only two very succinct, unpublished opinions on the issue. *Brandstetter v. Boyd*, No. 54229, 2010 WL 4684450, at \*1 (Nev. Nov. 12, 2010); *Crenshaw v. Conrad*, No. 49746, 2008 WL 6102109, at \*1 (Nev. Sept. 12, 2008). This failure could be a result of the judicial discomfort the tactic engenders. *See, e.g., RMA Ventures*, 576 F.3d at 1076–77 (Lucero, J., concurring) ("It is with considerable understatement that the majority acknowledges the 'degree of discomfort' presented by this case."); *Tax Track Sys. Corp. v. New Investor World, Inc.*, No. 01 C 6217, 2006 WL 1648491, at \*1 (N.D. Ill. June 9, 2006) ("This court will not . . . reach such an absurd result."). It is possible that the level of judicial discomfort the tactic engenders is the reason there are so many unreported opinions—the courts may be reluctant to create binding precedent and thus condone the practice.

214. Again, there are only about twenty-five cases that involve a judgment creditor attempting to obtain both sides of a lawsuit through enforcement of a judgment. *See supra* note 129 and accompanying text.

circumstances of each case.<sup>215</sup> This is the primary reason Washington's discretionary approach, which vests a trial court with the ability to allow a writ to issue or to refuse based on the facts and circumstances of each case, is preferable to a bright-line rule such as Utah's.<sup>216</sup> A bright-line rule, regardless of which party it favors, would undervalue the interests of the party it disfavors.

For example, a bright-line rule allowing the tactic has several potential negative effects. First, a policy allowing the tactic in all circumstances "would result in the extinction of every [claim] . . . by an impecunious judgment debtor," who cannot afford to pay a judgment or post bond to obtain a stay.<sup>217</sup> This is because the judgment creditor can obtain the judgment debtor's claim for a relatively small price, and the debtor will still be liable for the deficiency judgment.<sup>218</sup> Second, such a rule would give a malicious judgment creditor a free hand to engage in tortious conduct toward a poor judgment debtor, or to harass the judgment debtor with impunity.<sup>219</sup> Thus, such a rule confers a right on the judgment creditor far beyond the mere right to collect a judgment; it confers a form of immunity from suit, and thus, goes beyond the intended purpose of a writ of execution.<sup>220</sup> Moreover, because the judgment is transferrable, it could be passed along to other defendants, effectively denying the judgment debtor all access to the courts.<sup>221</sup> Such a construction of the law is unacceptable.

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215. *RMA Ventures* illustrates these interests well. 576 F.3d at 1076. The court was uncomfortable with the fact that the judgment creditor could extinguish an appeal to satisfy a judgment wholly dependent on the outcome of that appeal, indicating a concern for the judgment debtor's interests. *See id.* However, the judgment creditor also had an interest in collecting his judgment, and in this particular case, the judgment debtor failed to take advantage of the many opportunities for relief at his disposal. *Id.* These examples also demonstrate society's interest in a legal system that delivers just and final results in the most efficient manner possible. *See id.* This, after all, was the goal the court, in its careful consideration of these interests, was trying to achieve. *Id.*

216. *See Paglia v. Breskovich*, 522 P.2d 511, 513 (Wash. Ct. App. 1974).

217. *Tax Track*, 2006 WL 1648491, at \*1. One might speculate that the only reason this has not yet happened in states like Utah is simply because not many defense attorneys are aware of it.

218. *See Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 212 (Utah 1999).

219. For example, under 15 U.S.C. § 1692d (2006), "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." However, if the debt collector were to obtain a judgment against the debtor in default, he would be free to engage in such conduct because if the debtor sued, he could obtain a writ of execution against the claims and extinguish them. *Cf. Sohns v. Bramacint, LLC*, No. 09-1225 (JNE/FLN), 2010 WL 3926264 (D. Minn. Oct. 1, 2010) (holding that a debt collector was liable under § 1692d when the debt collector used a tactic called "caller ID spoofing" to make it appear a collection call was actually from the debtor's mother-in-law, then made veiled threats to take away the debtor's child). A debt collector using the tactic described in this Comment would thus be shielded from liability.

220. *See Paglia*, 522 P.2d at 514.

221. *Cf. id.* at 512. In *Paglia*, the judgment creditor purchased the judgment against the judgment debtor from a third party. *Id.* Although the *Paglia* court reversed the trial court's decision to issue a

A bright-line rule barring judgment creditors from executing on claims against themselves is not much better. In the case of a judgment debtor with few assets, the claim may be the only thing of value available to the judgment creditor.<sup>222</sup> If he is barred from executing on the claim, not only does he lose the value derived from its sale, but he also is forced to defend against the claim, potentially at great cost.<sup>223</sup> If the judgment creditor is successful in his defense, the debtor will have exhausted the claim, and there will be no value for the judgment creditor to recover to satisfy his judgment.<sup>224</sup> This result is particularly egregious if the judgment debtor's claim is frivolous or unlikely to succeed on the merits.

Therefore, instead of laying down a bright-line rule, courts should adopt a more flexible approach akin to Washington's and allow a trial court to issue or refuse to issue a writ based on the facts and circumstances of each case.<sup>225</sup> One might argue that a bright-line rule would save the court time and resources, is less costly to the litigants, provides certainty, and ensures uniformity of outcomes.<sup>226</sup> These are all valid points. However, courts engage in the sort of fact sensitive analysis required by a balancing test quite often (for instance, in the context of preliminary injunctions).<sup>227</sup> Also, in light of the small number of cases in which a judgment creditor actually attempts to execute on choses in action against itself, the increase in cost and burden on the courts will be minimal.<sup>228</sup> Thus, a balancing test similar to Washington's approach is preferable to a bright-line rule because it can accommodate for the interests of all parties while imposing only a minimal burden on the court and the litigants.

With that in mind, the way forward becomes clear. First, one must examine the interests that courts consider, whether explicitly stated or merely hinted at, in deciding the propriety of the tactic. Then, based on the results of this inquiry, one can formulate a test that courts can apply when confronted with the tactic that properly balances those interests.

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writ of execution, in a jurisdiction that has a bright-line rule allowing execution on choses in action, such a practice would be acceptable and might even become common. *Id.* at 514.

222. See *Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303, 305 (Iowa 1994).

223. *Id.*

224. *Id.*

225. See *Paglia*, 522 P.2d at 513.

226. See, e.g., *Prometheus Radio Project v. FCC*, 373 F.3d 372, 447 (3d Cir. 2004) (noting that the FCC considered these factors while developing its regulatory framework).

227. See, e.g., *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 766 (6th Cir. 2005).

228. See *supra* note 129 and accompanying text.

*B. The Interests at Stake when a Judgment Creditor Executes on Choses in Action Against Itself*

There are three interested parties when a judgment creditor attempts to satisfy a judgment by executing on a judgment debtor's choses in action against the judgment creditor: the judgment debtor, the judgment creditor, and society in terms of its interest in an efficient court system "that is just in both appearance and fact."<sup>229</sup>

1. The Judgment Debtor's Interests

Courts have considered several interests of the judgment debtor when deciding whether a judgment creditor can obtain choses in action against itself through a writ of execution. First and foremost, a judgment debtor in his capacity as plaintiff has an interest in having his claims heard on the merits by an impartial tribunal, a right which may even be guaranteed by a state constitution's open courts clause.<sup>230</sup> Second, a policy allowing judgment creditors to execute on claims against themselves incentivizes defendants to try to avoid litigation on the merits by using the tactic, and opens the door to abusive practices.<sup>231</sup> Third, the burden of a policy allowing these transactions also falls most heavily on indigent judgment debtors.<sup>232</sup> Finally, allowing a judgment creditor to execute on choses in action against itself is inequitable because the value of the plaintiff's claim will never be fairly determined—a rationale few courts have relied on, but one that deserves more credit than it has so far been given.<sup>233</sup>

The most important interest of the judgment debtor is his interest in having his claims heard by an impartial tribunal on the merits. This interest is hinted at in *Paglia v. Breskovich* when the court references the "grossly inequitable result" of vesting ownership of both sides of a lawsuit in one party.<sup>234</sup> The court in *MP Medical Inc. v. Wegman* explained that such a result is "'grossly inequitable' because the judgment debtor would be deprived of the opportunity to establish his claim."<sup>235</sup> In other words, if the judgment creditor is allowed to obtain both sides of the lawsuit, the claim

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229. Snow, Nuffer, Engstrom & Drake v. Tanasse, 980 P.2d 208, 212 (Utah 1999).

230. See Criswell v. Ginsberg & Foreman, 843 S.W.2d 304, 306–07 (Tex. App. 1992).

231. See RMA Ventures Cal. v. SunAmerica Life Ins. Co., 576 F.3d 1070, 1076–77 (10th Cir. 2009) (Lucero, J., concurring).

232. See, e.g., *Paglia v. Breskovich*, 522 P.2d 511, 515 (Wash. Ct. App. 1974) (Pearson, J., concurring) (noting that the tactic "borders on abuse of legal process" when a defendant's attorney purchases the plaintiff's claims against his client for the sole purpose of destroying plaintiff's right to maintain the suit).

233. See *Tanasse*, 980 P.2d at 208, 212.

234. 522 P.2d at 514.

235. 213 P.3d 931, 936 (Wash. Ct. App. 2009).

will be extinguished.<sup>236</sup> There are several reasons why allowing the extinguishment of a claim in this manner is undesirable, or perhaps even prohibited.

First, the extinguishment of a claim, as opposed to its transfer, may violate the open courts clause of the forum state's constitution.<sup>237</sup> This largely depends on how the state's courts have interpreted the state's open courts clause.<sup>238</sup> In Texas, for example, one court has held that the judicial turnover to a judgment creditor of claims against itself extinguishes any justiciable controversy, and therefore violates Texas's open courts clause.<sup>239</sup> The court recognized that when one party obtains both sides of a lawsuit the controversy ceases to exist, as one party cannot litigate against itself.<sup>240</sup>

236. *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306–07 (Tex. App. 1992). Most cases in which the tactic is successfully used will be extinguished through defendant's motion to dismiss. *See, e.g., RMA Ventures*, 576 F.3d at 1076. However, the motion to dismiss may not be necessary to extinguish the claim because the case or controversy that rendered the claim justiciable has ceased to exist and the court could dismiss the case *sua sponte*. If the claim were not extinguished, such actions would lead to the nonsensical situation of a court litigating a dispute in which a defendant defends itself against *itself* as plaintiff. Such a scenario violates the Case or Controversy Clause of the United States Constitution (for cases in federal courts), and the justiciability requirements of state constitutions (for those in state courts). *See* U.S. CONST. art. III, § 2, cl. 1; *Hoffert v. Gen. Motors Corp.*, 656 F.2d 161, 165 (5th Cir. 1981) (“[W]here both litigants desire the same result, there can be no case or controversy within the meaning of Article III.”).

237. *See Criswell*, 843 S.W.2d at 307. Appeals, on the other hand, are generally not protected by state constitutions. *MP Med.*, 213 P.3d at 936 (“MP Medical has no constitutional right to appeal in this case.”); *see supra* notes 122–25 and accompanying text. Although one notable exception is Utah, which guarantees a civil appeal of right from any judgment entered in its courts. UTAH CONST. art. VIII, § 5. At least one Utah court has interpreted this clause in the same manner as the state's open courts clause and has held that execution upon the appeal by a judgment creditor that the appeal is against does not violate the judgment debtor's constitutional right to an appeal. *Innnerlight, Inc. v. The Matrix Grp., LLC*, No. 060400775, 2007 WL 7210447, at \*3 (4th Jud. Dist. Ct. Utah Sept. 19, 2007).

Because appeals generally are not constitutionally protected, execution upon an appeal to satisfy a truly final judgment in a different action (i.e., one from which no appeal was taken) would be more proper than execution upon an appeal to satisfy a judgment from which the appeal was taken. The concern, discussed in *RMA Ventures*, is that to determine whether the writ of execution, acquisition by the opponent, substitution of the parties, and dismissal of the claims were proper, one must consider the merits of the appeal; but one cannot consider the merits if a motion to dismiss is granted. 576 F.3d at 1076; *see also MP Med.*, 213 P.3d at 936. However, it follows that in the situation of execution upon a chose in action at the appellate stage to satisfy a judgment that has been appealed, no constitutional considerations arise absent a clause similar to Utah's but interpreted more favorably to the holder of the right of appeal. However, it does not appear that courts have ever faced this situation.

238. *Compare Criswell*, 843 S.W.2d at 306–07, with *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 702–03 (Utah 2002).

239. *Criswell*, 843 S.W.2d at 306.

240. *Id.*

In contrast, the Supreme Court of Utah has held that such a scenario does not violate its open courts clause because the right of access to the courts transfers with the claim.<sup>241</sup> Initially, in *Tanasse*, the Supreme Court of Utah identified this point as one of the reasons for its holding that a law firm's acquisition of legal malpractice claims against itself violates public policy.<sup>242</sup> The court limited its holding to the acquisition of legal malpractice claims by the defendant lawyers, but it also recognized that this argument applies to other claims and other parties.<sup>243</sup>

In *Applied Medical Technologies v. Eames*, however, the Utah Supreme Court reasoned around this argument, noting that because choses in action are regularly transferred, the right guaranteed by the open courts clause is not a personal one, but one attached to the chose in action itself.<sup>244</sup> However, this argument ignores the fact that under ordinary circumstances, the chose in action is transferred to a third party with an equal interest in pressing the litigation to its maximum potential.<sup>245</sup> In other words, the party receiving the plaintiff's interest in the suit has the same incentive to recover as much as possible from the defendant, and the justiciability of the claim is not destroyed.<sup>246</sup> If the claim's justiciability is destroyed, as necessarily happens when the defendant acquires it, then it follows that the corresponding right to a hearing on the merits must also be destroyed, and the mere act of purchase by the defendant destroys it.<sup>247</sup> However, the *Applied Medical* court raises a valid point, and a state's supreme court is entitled to interpret its constitution in the manner it believes is most correct.<sup>248</sup> Still, there are other reasons that public policy favors a full hearing on the merits.

The second reason that a policy favoring a full hearing on the merits is desirable is that it reduces the incentive for defendants to avoid litigation by extinguishing plaintiffs' claims using a writ of execution.<sup>249</sup> As Judge Lucero noted in his concurring opinion in *RMA Ventures*, "This incentive is

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241. *Applied Med.*, 44 P.3d at 702–03.

242. *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 211 (Utah 1999).

243. *Id.* at 212.

244. *Applied Med.*, 44 P.3d at 702–03.

245. *Cf. Associated Ready Mix, Inc., v. Douglas*, 843 S.W.2d 758, 762 (Tex. App. 1992) (making a similar argument in a turnover context).

246. *See id.* Courts also consider whether a party has the same incentive to litigate in the context of whether to apply offensive nonmutual collateral estoppel to prevent duplicative litigation of an issue. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–32 (1979).

247. *See Hoffert v. Gen. Motors Corp.*, 656 F.2d 161, 165 (5th Cir. 1981).

248. *Arizona v. Evans*, 514 U.S. 1, 9 (1995) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940))).

249. *Amphibious Partners LLC v. Redman*, 389 F. App'x 762, 767 (10th Cir. 2010) (Lucero, J.) ("[W]e note that a judgment creditor is most highly motivated to utilize the procedure employed below when the claims against it are meritorious—a troubling incentive structure.").

at its zenith when it is most offensive—in those cases in which a defendant believes it would likely lose the [on the] merits . . . .”<sup>250</sup> Judge Pearson’s hypothetical from his concurring opinion in *Paglia* illustrates this dilemma:

[L]et us suppose that the cause of action levied upon is a personal injury action in which the injured plaintiff, because of severe injuries, suffers great economic hardship while his lawsuit is pending. Let us suppose further that counsel for the defendant acquires by assignment a judgment debt for medical expenses incurred by the plaintiff as a result of his injuries. Should the law permit counsel for [the] defendant to destroy plaintiff’s cause of action by becoming the owner of it? To ask the question is to answer it. The law should never be interpreted so as to subvert justice.<sup>251</sup>

A judgment creditor in the position of the one in Judge Pearson’s hypothetical will naturally want to avoid litigating a meritorious claim, for he will likely lose and face substantial liability.<sup>252</sup> In fact, such considerations are often the main factor motivating a judgment creditor to execute upon a judgment debtor’s cause of action against the judgment creditor.<sup>253</sup> When the judgment creditor is brazen enough to admit his true motivation, courts have not responded favorably.<sup>254</sup> Execution is meant to provide a means for a judgment creditor to collect money to satisfy a judgment, not to provide a shield against liability.<sup>255</sup> Essentially, the courts

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250. *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1077 (10th Cir. 2009) (Lucero, J., concurring).

251. *Paglia v. Breskovich*, 522 P.2d 511, 515 (Wash. Ct. App. 1974). The fact that Judge Pearson referred to counsel for the defendant and not the defendant is irrelevant—because counsel was acting in his client’s interest, it does not alter this Comment’s analysis. *See id.*

252. *See RMA Ventures*, 576 F.3d at 1077 (Lucero, J., concurring).

253. *See, e.g., Paglia*, 522 P.2d at 512.

254. *MP Med. Inc. v. Redman*, 213 P.3d 931, 933 (Wash. Ct. App. 2009) (“Because the trial court was aware that respondents sought to dismiss MP Medical’s case by purchasing its appeal, we hold that the trial court should have exercised its inherent supervisory authority over its own process to [prevent that result.]”); *Paglia*, 522 P.2d at 514–15; *see also* *Commerce Sav. Ass’n v. Welch*, 783 S.W.2d 668, 668–69 (Tex. App. 1989) (“[Judgment creditor] attempted a novel strategy which, if successful, would allow it to extinguish a cause of action against it by a plaintiff who happens to be a judgment debtor in an unrelated action. We affirm the trial court’s judgment invalidating the strategy.”).

255. *Paglia*, 522 P.2d at 514.



are reacting negatively to a misuse of the execution statutes that “would outrage the right of a judgment debtor if allowed to stand.”<sup>256</sup>

Third, the burdens of such a policy rest most heavily on indigent judgment debtors who cannot afford to pay the judgment or, in the case of an appeal, to post a supersedeas bond.<sup>257</sup> Judge Pearson’s hypothetical illustrates this point as well.<sup>258</sup> A plaintiff who is injured by the misconduct of a defendant and cannot afford to pay his medical bills, as in the example, is precisely the type of person who needs the aid and protection of the law most.<sup>259</sup> Further, if the practice of executing upon choses in action against oneself becomes more commonplace, such a policy “would result in the extinction of every [cause of action or] appeal from an adverse judgment by an impecunious judgment debtor.”<sup>260</sup>

A judgment debtor also has an interest in maximizing the value of his or her claims, and that value “will never fairly be determined” at an execution sale.<sup>261</sup> The Utah Supreme Court recognized a judgment debtor’s interest in receiving the full value of his claims in *Tanasse*, and partly relied on this rationale in holding that an attorney or law firm could not execute on legal malpractice claims against itself.<sup>262</sup> In other cases, judges have made this argument in concurring opinions.<sup>263</sup> Also, in cases involving the direct turnover or assignment to a judgment creditor of a chose in action against itself, this rationale has been relied on.<sup>264</sup> Yet, in the context of a judgment creditor executing on and purchasing a cause of action against itself, more

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256. *Id.* (quoting *Triplett v. Bergman*, 144 P. 899, 900 (Wash. 1914)). One might label this a species of “good faith” analysis. The question would be whether the judgment creditor actually sought to satisfy the judgment by the levy and sale of the judgment debtor’s claims against him, or whether the judgment creditor merely hoped to avoid being hauled into court to defend against those claims.

257. *But see infra* notes 308–11 and accompanying text (discussing how a judgment debtor’s indigence may affect a judgment creditor’s interests).

258. *See Paglia*, 522 P.2d at 515.

259. *O’Connor v. Matzdorff*, 458 P.2d 154, 156 (Wash. 1969) (“The right of the poor to obtain redress for wrongs, and to defend themselves when sued by the more affluent, is presently of nationwide concern . . .”).

260. *Tax Track Sys. Corp. v. New Investor World, Inc.*, No. 01 C 6217, 2006 WL 1648491, at \*1 (N.D. Ill. June 9, 2006).

261. *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1077 (10th Cir. 2009) (Lucero, J., concurring). *But see Amphibious Partners LLC v. Redman*, 389 F. App’x 762, 766–67 (10th Cir. 2010) (Lucero, J.) (arguing that an execution sale provides at least minimal safeguards for the judgment debtor, as opposed to the outright transfer of choses in action from the judgment debtor to the judgment creditor).

262. *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 210–11 (Utah 1999).

263. *See RMA Ventures*, 576 F.3d at 1077 (Lucero, J., concurring); *Paglia*, 522 P.2d at 515 (Pearson, C.J., concurring).

264. *Amphibious Partners*, 389 F. App’x at 762, 766–77; *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 762 (Tex. App. 1992); *Commerce Sav. Ass’n v. Welch*, 783 S.W.2d 668, 671 (Tex. App. 1989).

majority opinions have rejected the argument than have been persuaded by it.<sup>265</sup>

Courts have rejected this argument because an execution sale provides a “key safeguard” in the form of a public sale.<sup>266</sup> The argument in favor of this view is that the value of the chose in action for the purposes of execution is established by the execution sale itself.<sup>267</sup> Moreover, the sale is open to the public; a judgment debtor may appear and bid on his claims alongside the judgment creditor and the world at large.<sup>268</sup>

These arguments ignore two factors that set unliquidated choses in action apart from other forms of property. First, because of the level of difficulty inherent in any estimation of value for a chose in action,<sup>269</sup> and the lack of a market for unliquidated claims,<sup>270</sup> a judgment debtor is unlikely to receive a fair price for his claims.<sup>271</sup> In fact, “in many instances the judgment creditor will be the sole bidder at [execution] sales, just as mortgagees frequently submit lone bids at foreclosure auctions,” and will

265. Compare *Citizens Nat’l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1010 (Miss. 2006) (rejecting argument), and *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 702–03 (Utah 2002) (same), with *Tanasse*, 980 P.2d at 210–11 (relying, in part, on the value argument).

266. *Amphibious Partners*, 389 F. App’x at 767; see *Citizens Nat’l*, 935 So. 2d at 1014.

267. *Citizens Nat’l*, 935 So. 2d at 1004, 1011. The court noted that the subjective view of a litigant as to the value of the chose in action is irrelevant, and no “valuation by trial” is necessary. *Id.* at 1010–11.

268. *Amphibious Partners*, 389 F. App’x at 767; see also *RMA Ventures*, 576 F.3d at 1072 n.4.

269. *Amphibious Partners*, 389 F. App’x at 766 (“We base our conclusion in large part on the extraordinary difficulty in estimating the value of a chose in action.”).

270. See *Marcushamer*, *supra* note 21, at 1572–73, 1598 (advocating the development of a market for unliquidated tort claims).

271. *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 211 (Utah 1999); see also *RMA Ventures*, 576 F.3d at 1077 (Lucero, J., concurring) (noting that the value of such choses in action “will never be fairly determined” at an execution sale). This concern was the reason that the California legislature amended its execution statute in 1941 to exempt pending choses in action from execution and allow a judgment creditor to reach them through a lien. *Denham v. Farmers Ins. Co.*, 213 Cal. App. 3d 1061, 1071 (1989) (“In 1941, the California Legislature amended Code of Civil Procedure section 688 to prohibit execution upon a cause of action due to the danger that a sale of the action would realize far less than it was worth.”); *Abatti v. Eldridge*, 103 Cal. App. 3d 484, 486–87 (1980) (“The purpose of the 1941 amendment was to eliminate the danger that the plaintiff-judgment debtor would be deprived of his cause of action at a figure far below its actual worth, and thereby have less of his judgment debt satisfied than proper.”); Symposium, *The Work of the 1941 Legislature*, 15 S. CAL. L. REV. 1, 18 (1941) (“Since experience has demonstrated that a cause of action upon which an action is pending does not bring very much on execution sale [footnote omitted] the remedy now provided for by Section 688.1 is a more just and reasonable one. It protects the judgment creditor and gives him adequate relief and at the same time does not produce unfair hardship insofar as the judgment debtor is concerned.”).

therefore name his own price.<sup>272</sup> Thus, this “key safeguard” provides little practical protection, because if the judgment debtor could afford to outbid the judgment creditor at the sale, he probably could afford to pay the judgment or post a sufficient bond to obtain a stay.<sup>273</sup> Second, there is a significant danger of windfall in favor of the judgment creditor through his avoidance of a potentially substantial judgment for a fraction of the cost.<sup>274</sup>

Thus, a bright-line rule allowing a judgment creditor to execute against choses in action against himself does violence to several interests of the judgment debtor. It denies the judgment debtor a chance to establish his claim on the merits and potentially violates his right of access to the courts. It sanctions the use of a writ of execution as a means of avoiding litigation, and this incentive only intensifies with the strength of the plaintiff’s claim, leaving the judgment debtor open to abuse. The result of this policy is that a judgment creditor faced with a lawsuit filed by an indigent judgment debtor needs only to obtain a judgment against the judgment debtor to escape liability.<sup>275</sup> Finally, it deprives the judgment debtor of a claim of potentially substantial value and provides a windfall to the judgment creditor. Thus, the judgment debtor stands to suffer substantial harm if his judgment creditor is allowed to execute upon and purchase claims against itself.<sup>276</sup> A

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272. *Amphibious Partners*, 389 F. App’x at 767; *Marantha Faith Ctr., Inc. v. Colonial Trust Co.*, 904 So. 2d 1004, 1009 (Miss. 2004).

273. See, e.g., *Paglia v. Breskovich*, 522 P.2d 511, 512 (Wash. Ct. App. 1974). In *Paglia*, the plaintiff judgment debtor raised enough money to satisfy one judgment, and thus forestalled execution on his choses in action. *Id.* But when the judgment creditor purchased a second outstanding judgment and obtained a second writ of execution, plaintiff had no further resources to draw from, and the sale went forward. *Id.* Of course, if the judgment debtor *does* have sufficient assets, this changes the analysis. See *infra* notes 305–07 and accompanying text.

274. *Tanasse*, 980 P.2d at 212. In *Tanasse*, the court noted that “[t]here may be a significant motivation for the lawyer to ‘buy out’ the malpractice claim for a nominal amount (or at least for an amount the lawyer designates), leaving a deficiency judgment owing, while the client loses the opportunity to litigate.” *Id.* However, the court continued: “Although such a practice may be acceptable in cases not involving legal malpractice claims,” the potential for damage to the public trust in the legal profession was too great of a risk to allow lawyers to execute on such claims. *Id.*; see also *Amphibious Partners*, 389 F. App’x at 767–68.

275. One particularly egregious example of this would be a variation of the facts of *Citizens National Bank v. Dixieland Forest Products, LLC*, 935 So. 2d 1004, 1006–07 (Miss. 2006). In that case, the judgment debtor sued the defendant bank, who counterclaimed on a debt owed by the plaintiff. *Id.* The bank succeeded in its counterclaims and executed on the judgment debtor’s original claims against itself to satisfy the judgment. *Id.* at 1007–08. Apparently, the plaintiffs in this case were well-to-do. See *id.* at 1006. However, if one considers such a fact pattern in the context of, for example, a Truth in Lending Act claim under 15 U.S.C. § 1601 (2006) filed by an indigent plaintiff behind on her bills (perhaps as a result of the lender’s misrepresentations), one can see how it would grant near immunity for a lender. See, e.g., *Plant v. Blazer Fin. Servs., Inc. of Ga.*, 598 F.2d 1357, 1359 (5th Cir. 1979). When sued, all the lender would have to do is counterclaim on any unpaid debt, move for summary judgment, and execute on the plaintiff’s claims, thereby escaping all liability on the plaintiff’s claims. See *id.*

276. It may be that the judgment debtor will suffer some of these consequences even if a third party purchases the claims against the creditor. However, such a situation is less egregious than if a judgment creditor purchases claims against itself because a third party will actually litigate the

discretionary approach like Washington's will allow courts to accommodate these interests in deciding whether a writ of execution should issue; however, Washington's approach fails to provide the court with a clear sense of when it should refuse to issue the writ of execution, and further guidance on the factors courts should consider would be helpful.<sup>277</sup>

## 2. The Judgment Creditor's Interests

Balanced against the interests of the judgment debtor are the interests of the judgment creditor, which can also be identified through an analysis of the cases described in the preceding Part.<sup>278</sup> In descending order of importance, these interests include: protection of a right established through litigation that resulted in a conclusive, binding judgment in a court of law;<sup>279</sup> preservation of the assets of a judgment debtor for payment of the judgment;<sup>280</sup> protection against unmeritorious claims filed in the hope of forcing a settlement;<sup>281</sup> and preventing collateral attack of an execution sale.<sup>282</sup>

The judgment creditor's interest in protecting a right established through litigation is the most important interest.<sup>283</sup> This consideration, even when it is not explicitly acknowledged, provides a backdrop for every decision that deals with the issue of whether a judgment creditor can execute on causes of action against himself.<sup>284</sup> After all, the goal of execution is to provide a

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claim. *See* Associated Ready Mix, Inc. v. Douglas, 843 S.W.2d 758, 762 (Tex. App. 1992). Thus, in some sense, the harm to the judgment debtor's interests is heightened by the fundamental injustice of allowing a judgment creditor to avoid liability for injury that he caused.

277. *Paglia*, 522 P.2d at 513 (holding that a trial court should exercise its supervisory powers to prevent an inequitable result if "exercisable when the demands of justice to all parties can be reasonably satisfied").

278. *See supra* Part III.

279. *See* McVeigh v. Lerner, 849 S.W.2d 911, 915 (Tex. App. 1993).

280. *See* Chrysler Credit Corp. v. Rosenberger, 512 N.W.2d 303, 305 (Iowa 1994).

281. *See* Snow, Nuffer, Engstrom & Drake v. Tanasse, 980 P.2d 208, 213 (Utah 1999) (Zimmerman, J., concurring and dissenting) (noting that disallowing the tactic would give judgment debtors "additional and unjustified leverage . . . in trying to settle such a suit for more than it is objectively worth").

282. *See* RMA Ventures Cal. v. SunAmerica Life Ins. Co., 576 F.3d 1070, 1076 (10th Cir. 2009).

283. *McVeigh*, 849 S.W.2d at 915 ("The purpose of execution of a judgment is . . . to transfer that property to the hands of the prevailing party—where, by virtue of the judgment itself, it has been decided through due process and course of law that the property belongs.").

284. This concern is most obvious in *Johnson v. Dahlquist*, 225 P. 817, 818 (Wash. 1924) ("[W]hy should not [a judgment debtor's] assets, whatever their nature, be taken to satisfy a judgment?").

means for a successful litigant to obtain satisfaction for injury—whether financial, physical, or emotional—at the hands of the judgment debtor.<sup>285</sup>

Within this interest, there appear to be two mitigating factors that affect a court’s analysis: first, whether an appeal was taken from the judgment to be satisfied, and second, whether the judgment creditor was actually a party to the proceeding in which the judgment to be satisfied was entered.<sup>286</sup> For the purposes of appeal, a judgment is final if it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>287</sup> The same is technically true for execution.<sup>288</sup> However, courts appear to recognize that there is a qualitative difference between a judgment from which no appeal is taken and a judgment which has been appealed, in that the former is conclusive while the latter may be reversed.<sup>289</sup> When a judgment creditor executes on a judgment debtor’s cause of action and appeals against the judgment creditor to satisfy the same judgment from which the appeal was taken, the judgment creditor’s interest in enforcing the judgment appears to carry less force with the courts.<sup>290</sup> Although there are no cases that deal with execution on a judgment debtor’s cause of action to satisfy a judgment in a separate action that is pending appellate review, presumably the concern would still exist in that situation.<sup>291</sup> Therefore,

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285. See *Peacock v. Thomas*, 516 U.S. 349, 359 (1996) (“To protect and aid the collection of a federal judgment, the Federal Rules of Civil Procedure provide fast and effective mechanisms for execution.”); *Cnty. Trust Co. v. Berg*, 318 N.Y.S.2d 154, 156 (Sup. Ct. 1971) (“The policy of the law is to assist rather than to make it more difficult for the judgment creditor.”).

286. See *RMA Ventures*, 576 F.3d at 1076; *Paglia v. Breskovich*, 522 P.2d 511, 512 (Wash. Ct. App. 1974).

287. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

288. *Katz v. N.M.E. Hosps., Inc.*, 842 So. 2d 853, 854 (Fla. Dist. Ct. App. 2002).

289. See, e.g., *MP Med. Inc. v. Wegman*, 213 P.3d 931, 936 (Wash. Ct. App. 2009). The court held that “allowing one party to destroy the opposing party’s appeal by becoming its owner through enforcement of the very judgment under review is fundamentally unjust.” *Id.* This fundamental injustice appears to arise from the fact that there is a chance the judgment on which the execution is based will be reversed. Both the majority in *RMA Ventures* and Judge Lucero in his concurring opinion expressed this concern. *RMA Ventures*, 576 F.3d at 1075–76; *id.* at 1076 (Lucero, J., concurring). Similarly, some courts have even held that an appealed judgment is void for res judicata purposes, though these courts are in the minority. *YEAZELL*, *supra* note 109, at 688. Some legislatures have also recognized this fundamental difference. See *supra* note 57.

290. See *RMA Ventures*, 576 F.3d at 1077 (“[I]n the typical situation—to the extent any such transaction may be termed ‘typical’—a judgment creditor executes upon a final judgment in one case to purchase a chose in action in a separate and distinct case. By contrast, SunAmerica purchased the right to appeal in the same case that produced the judgment upon which it executed. Thus this appeal’s circularity: We cannot reach the merits of this appeal if we grant the motion to dismiss, but we cannot know whether the motion to dismiss is well-taken unless we reach the merits.”).

291. A supplemental judgment, like the one for attorney’s fees in *RMA Ventures*, is technically a separate judgment. *Id.* at 1073. However, a judgment for attorney’s fees is granted in the same action as and stands or falls with a judgment on the merits. *Id.* at 1075. *Amphibious Partners LLC v. Redman* comes much closer, in that the judgment creditor sought assignment of the judgment debtor’s pending case in another jurisdiction, and the trial court granted the motion. 389 F. App’x 762, 762 (10th Cir. 2010). The judgment debtor appealed the trial court’s grant of the motion, and

when the judgment to be enforced is actually final, i.e., not pending appellate review, a court is more likely to allow the judgment creditor to execute on the choses in action of a judgment debtor.<sup>292</sup> If a judgment has been appealed, it does not destroy the judgment creditor's interest in or ability to enforce the judgment, but it does lessen its impact.<sup>293</sup>

Courts are also influenced by whether the judgment creditor was a party to the proceeding in which the judgment was entered or merely purchased an unsatisfied judgment from a third party.<sup>294</sup> In cases where a judgment creditor obtained the judgment as a party to prior litigation, the courts are more likely to allow a writ of execution to issue.<sup>295</sup> A likely reason for this is because the judgment creditor is trying to vindicate some wrong done to him, personally, by the judgment debtor.<sup>296</sup> In contrast, when a judgment creditor obtains a judgment against a judgment debtor from a third party for the sole purpose of destroying the judgment debtor's unrelated claims against the judgment creditor, courts have not been sympathetic.<sup>297</sup> Obtaining a judgment for the sole purpose of avoiding litigation is little more than an attempt to avoid liability and not an attempt to right a wrong

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the judgment creditor moved to substitute itself while the appeal was pending. *Id.* at 763. However, this case is not quite on point for two reasons. First, it involved assignment of the claims, and not levy and execution. *Id.* Second, the appeal was taken from the trial court's order assigning the claim, and the debtor had already appealed the judgment on the merits and lost. *Id.* The specific issue for which there appears to be no precedent is how courts view execution on a chose in action to satisfy a judgment on the merits in a separate action which has been appealed. The best clue out there is that Judge Lucero, writing for the majority in *Amphibious Partners*, distinguished *RMA Ventures* on the grounds that it concerned "the seizure of the right to prosecute the very appeal at issue, not of a separate chose in action." *Id.* at 764. Thus, it is probable that the courts will view execution upon a claim separate and distinct from the case at hand differently than execution on a claim to satisfy a judgment in the same case. This Comment's point, however, is that the same concerns apply, but to a lesser degree; namely, that the creditor is executing upon a cause of action to satisfy a judgment of dubious continuing validity.

292. See *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1014 (Miss. 2006) ("Significantly, the plaintiffs never appealed the final judgment." (emphasis added)).

293. See *MP Med.*, 213 P.3d at 936.

294. See *Paglia v. Breskovich*, 522 P.2d 511, 512 (Wash. Ct. App. 1974). But see *Citizens Nat'l*, 935 So. 2d at 1011 ("The bank correctly notes . . . it would make no difference if the bank had obtained its judgments in a separate court proceeding against the plaintiffs . . . [or] if the bank had bought the two judgments from [a] third party." (second ellipsis and bracketed material in original)).

295. Compare *Applied Med. Techs. v. Eames*, 44 P.3d 699, 700, 704 (Utah 2002), with *Paglia*, 522 P.2d at 514.

296. See *Citizens Nat'l*, 935 So. 2d at 1007 (judgment debtor's failure to make payments on a promissory note to judgment creditor); *Applied Med.*, 44 P.3d at 700 (failure to make mortgage payments owed to defendant); *Johnson v. Dahlquist*, 225 P. 817, 817 (Wash. 1924) (award of costs on appeal).

297. See *Paglia*, 522 P.2d at 514.

done to the judgment creditor personally.<sup>298</sup> This is closely related to the skewed incentive structure Judge Lucero was concerned about in his majority opinion in *Amphibious Partners*<sup>299</sup> and his concurring opinion in *RMA Ventures*.<sup>300</sup> In short, it is “grossly inequitable” to allow a defendant to destroy claims against himself without regard to the merits by purchasing another person’s right to recover from the judgment debtor.<sup>301</sup>

The second interest of the judgment creditor involved in cases where one attempts to execute upon an opponent’s cause of action is the judgment creditor’s interest in ensuring that the plaintiff has sufficient assets with which to satisfy the judgment.<sup>302</sup> Surprisingly, this concern has not been the focus of much discussion by the courts that have faced the issue, even though the entire point of execution is to “transfer [the judgment debtor’s] property to the hands of the prevailing party.”<sup>303</sup> In fact, of all the cases in which courts considered whether to allow the tactic, only the Iowa Supreme Court has relied on this argument.<sup>304</sup>

One possibility is that the judgment debtor has sufficient assets apart from the choses in action against the judgment creditor to satisfy the judgment.<sup>305</sup> A judgment debtor that has assets in excess of the amount of the judgment can conceivably pay the judgment or file a supersedeas undertaking to stay enforcement of that judgment pending appeal.<sup>306</sup> It follows that if a valid writ of execution issues, it is only because the judgment debtor has either failed to pay the judgment or failed to post a supersedeas bond.<sup>307</sup> In such a situation, the judgment creditor is more justified in executing upon a judgment debtor’s chose in action, because the

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298. *See id.*

299. *Amphibious Partners LLC v. Redman*, 389 F. App’x 762, 767 (10th Cir. 2010).

300. *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1076–77 (10th Cir. 2009).

301. *Paglia*, 522 P.2d at 514.

302. *See Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303, 305 (Iowa 1994). This is the underlying rationale for requiring a supersedeas undertaking to forestall enforcement of a judgment pending appeal. *See supra* notes 76–82 and accompanying text.

303. *McVeigh v. Lerner*, 849 S.W.2d 911, 915 (Tex. App. 1993).

304. *Chrysler*, 512 N.W.2d at 305.

305. *See RMA Ventures*, 576 F.3d at 1076 (“Plaintiff has never argued an inability to pay the judgment or post a bond.”).

306. *See Athridge v. Iglesias*, 464 F. Supp. 2d 19, 24–25 (D.D.C. 2006). In some jurisdictions, a supersedeas bond can consist of real property. *Id.* In *RMA Ventures* the judgment debtor’s apparent ability (or, more accurately, failure to argue its inability) to either pay the judgment or file a supersedeas undertaking was one of the deciding factors that both the majority and concurring opinions focused on in disposing of the case. 576 F.3d at 1076; *id.* at 1077 (Lucero, J., concurring). One potential concern is if the judgment creditor’s assets are tied up in real estate or tangible personal property that will have to be sold in order to raise the money to pay or stay the judgment. In such a situation, the equities may shift more toward the judgment debtor, making execution on his claims by the judgment creditor less appropriate.

307. *See RMA Ventures*, 576 F.3d at 1076.

debtor could have prevented the writ from issuing if he truly wanted to retain control of his chose in action.

At the other extreme is a situation where the judgment debtor has few or no assets apart from the choses in action upon which the judgment creditor may execute.<sup>308</sup> This was the scenario posited by Justice Zimmerman in *Tanasse*, in which he advocated allowing execution by an attorney on a former client's legal malpractice claims against himself only if it was the last asset of the judgment debtor.<sup>309</sup> This increases the gravity of the judgment creditor's interest in executing on the choses in action immediately for two reasons. First, there is no other property to which the judgment creditor can turn to satisfy the outstanding judgment.<sup>310</sup> Second, if the judgment debtor is allowed to pursue the chose in action and loses on the merits, whatever value the chose in action has will be exhausted, leaving nothing at all for the judgment creditor.<sup>311</sup>

If a judgment debtor is allowed to exhaust his right to pursue a cause of action that ultimately fails, not only is the judgment creditor left holding the proverbial bag for the original judgment, but it was also forced to defend against a claim, perhaps at great expense, that could have gone toward satisfaction of the judgment.<sup>312</sup> Thus, in such a situation, the third interest of the judgment creditor—the interest in avoiding frivolous litigation—is implicated. As one court noted, “[f]rivolous appeals or petitions should not

308. See, e.g., *Paglia v. Breskovich*, 522 P.2d 511, 512 (Wash. Ct. App. 1974) (stating that judgment debtor's only asset was the claim upon which judgment creditor sought to execute).

309. *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 213 (Utah 1999) (Zimmerman, J., concurring and dissenting). However, Justice Zimmerman also argued that if the claim was the last asset of the debtor, if the execution took place within one year of filing the claim, and if it was not for equivalent value, then the debtor could declare bankruptcy and avoid the execution. *Id.* In this way the claim would be preserved. *Id.*

310. See *id.*

311. *Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303, 305 (Iowa 1994). The Supreme Court of Iowa explained:

Chrysler contends that, if the stay is granted, its rights will be prejudiced because it now has offers from some of the other defendants to contribute to the claim. But, if the matter is allowed to proceed to trial, and a defense verdict is rendered, the federal claim would be valueless. Chrysler would be left without any remedy to collect its state court judgment. In addition, Chrysler argues that in a \$10,000,000 lawsuit the costs would be considerable, and the plaintiff may not be able to prosecute it successfully.

*Id.* Similarly, if the plaintiff fails to appeal and the execution is completed before the statutory period expires, it may have some value left, but that value will be severely diminished. Note, however, that if a judgment debtor is *successful* in his claim after execution upon it has been denied, the judgment creditor will be entitled to an offset. *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 763 (Tex. App. 1992). Thus, this concern is only implicated if the judgment debtor's claim fails in the end or is likely to fail in the end.

312. *Chrysler*, 512 N.W.2d at 305.



be encouraged, since the defendant has little hope of recovering his costs from the indigent plaintiff if he defeats the action.”<sup>313</sup> However, there is a difference between “frivolous” claims and claims that lack merit, in that a claim that is ultimately found to be deficient on the merits might have a colorable claim to validity.<sup>314</sup> In such a situation, the way to determine the merits of a case is through litigation.<sup>315</sup> There is an important distinction between determining the rights and interests of parties through litigation according to due process of law and through allowing one party to circumvent the system and extinguish the claim of another regardless of the merits. Thus, the more meritorious the claim against a judgment creditor, the less just it is to allow a judgment creditor to extinguish it through execution.

The fourth interest of the judgment creditor is present only in situations where the judgment debtor fails to contest a writ of execution and a sale takes place.<sup>316</sup> In such a situation, the judgment creditor has an interest in preserving the finality of a writ of execution and subsequent execution sale.<sup>317</sup> In fact, this can be a powerful argument on the side of a judgment

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313. O'Connor v. Matzdorff, 458 P.2d 154, 160 (Wash. 1969). However, the court continued: The fear has been expressed that, if the poor are allowed to litigate without paying the ‘detering’ court fees, they will inundate the courts with frivolous cases. This attitude overlooks the fact that the poor are most often ignorant of judicial processes, except insofar as they are the victims of such processes. Not only do they not know what remedies exist for the wrongs done them and not only are they ignorant of the procedures for availing themselves of these remedies, but their attitude toward the courts is one of fear.

*Id.* at 160–61. The court was considering whether the trial court should have waived its filing fees for an indigent plaintiff, and not whether a writ of execution should issue. *Id.* at 155. However, the reasoning in the quoted material is a reminder that it would be incorrect to assume that indigent litigants regularly use legal process as a means of seeking a windfall.

314. See FED. R. CIV. P. 11 advisory committee’s notes b & c (indicating that an argument is nonfrivolous if an attorney can find some support for it in minority opinions, law review articles, or consultation with other attorneys). The advisory committee notes also indicate that the rule is not meant to dampen an attorney’s creativity or enthusiasm, but to prevent an attorney from making claims that are totally without support or in bad faith. *Id.*; see also DEBORAH L. RHODE, ACCESS TO JUSTICE 26–29 (2004) (“[W]hat qualifies as a frivolous claim generally depends on the eye of the beholder.”).

315. See *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1077 (10th Cir. 2010) (Lucero, J., concurring); cf. *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306–07 (Tex. App. 1992) (noting that a judgment creditor, if allowed to obtain the judgment debtor’s cause of action, “can extinguish it entirely without its ever being litigated”).

316. See, e.g., *Paglia v. Breskovich*, 522 P.2d 511, 514 (Wash. Ct. App. 1974). The *Paglia* court acknowledged this concern, but still found that the trial court had the power to avoid the “inequitable result” of one party owning both sides of a lawsuit. *Id.*

317. This point is actually somewhat obvious, because the judgment creditor in all of the cases in which a sale has already taken place is the party defending against the judgment debtor’s motion to set aside the sale. See, e.g., *Citizens Nat’l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1008 (Miss. 2006).

creditor.<sup>318</sup> However, if the judgment debtor is diligent in taking all procedural steps necessary to combat the writ of execution, including moving to quash the writ and appealing from the denial of such a motion, this concern should be a non-issue.<sup>319</sup>

Thus, the judgment creditor has several strong arguments in favor of being allowed to execute on choses in action against himself.<sup>320</sup> The strength of these arguments will, of course, depend on the facts of each case. In some cases, the judgment creditor's interests may outweigh the judgment debtor's, and in others, the courts may reach the opposite conclusion. In any event, the court should have the opportunity to consider the interests of both parties before deciding whether a writ of execution should issue.

### 3. Society's Interests

Society's interests are fourfold.<sup>321</sup> First, society has an interest in maintaining the integrity and fairness of its courts.<sup>322</sup> Second, and closely related, is society's interest in ensuring that the judgments entered by its courts are enforced.<sup>323</sup> Third, society has an interest in resolving disputes efficiently.<sup>324</sup> Finally, society has an interest in ensuring that its courts are open to all comers and that justice is equally available to all citizens.<sup>325</sup>

The first and second interests of society are closely related because a judgment, or the enforcement thereof, is really just an extension of the court's process.<sup>326</sup> Implicit in the role of the courts as arbiters of justice is

318. See, e.g., *RMA Ventures*, 576 F.3d at 1076 ("Because Plaintiff did not appeal the district court's decision allowing the execution sale to proceed, we will not consider Plaintiff's arguments attacking the sale's lawfulness.").

319. See, e.g., *MP Med. Inc. v. Wegman*, 213 P.3d 931, 934 (Wash. Ct. App. 2009). Plaintiff judgment debtor filed a motion to controvert wrongful seizure by execution and, when that was denied, filed an emergency motion with the court of appeals for "immediate review of the trial court's denial of its motion." *Id.* This is a prime example of a diligent effort to combat the writ of execution, which forced the court to confront the issue head-on and was successful as to that issue. *Id.* at 936. However, plaintiff ultimately lost on the merits of the appeal. *Id.* at 941.

320. See *supra* notes 279–82 and accompanying text.

321. For the purposes of this Comment, "the interests of society" is used to denote the interests of society as a whole and the interests of the court, which is society's representative in the dispute between the parties.

322. See *MP Med.*, 213 P.3d at 936.

323. See *RMA Ventures*, 576 F.3d at 1074 (noting the high volume of civil litigation in the United States).

324. See YEAZELL, *supra* note 109, at 263.

325. See generally Phillips, *supra* note 112.

326. See *MP Med.*, 213 P.3d at 936 (holding that a trial court has supervisory power over its own process—specifically the procedure for executing on the property of a judgment debtor).

the proposition that “courts have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.”<sup>327</sup> Consequently, they are “entitled to take steps necessary to enforce [their] decision[s].”<sup>328</sup> Executions are meant to “provide fast and effective mechanisms” for courts to employ to that end.<sup>329</sup> However, a court should temper any interest in enforcing a judgment rendered by that court, or a sister court, with the court’s interest in preventing its process from becoming a tool used by litigants to achieve an unjust result.<sup>330</sup> As the Court of Appeals of Washington recognized in *Paglia* and *MP Medical*, a court has a strong interest in supervising its own process to prevent that process from becoming an instrument of oppression.<sup>331</sup> This is probably why courts have reacted so unfavorably to judgment creditors that unabashedly admit that the reason they are attempting to execute on a claim against themselves is to destroy the judgment debtor’s ability to pursue it.<sup>332</sup> That motive suggests bad faith and is especially egregious when the judgment debtor has other property more valuable than the choses in action that could be used to satisfy the judgment.<sup>333</sup>

Society and its tribunals also have an interest in efficiency. With the courts becoming notoriously backlogged over the past several decades, this interest has taken on greater importance.<sup>334</sup> After all, it is society that ultimately bears the cost through the expense of financing the courts or through the expenditure of the parties’ resources on litigation rather than production.<sup>335</sup> In some cases it may be extremely efficient to allow a judgment creditor to execute upon a judgment debtor’s cause of action

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327. *RMA Ventures*, 576 F.3d at 1074 (quoting *Degen v. United States*, 517 U.S. 820, 823 (1996)) (internal quotation marks omitted).

328. *Id.*

329. *Id.* (quoting *Peacock v. Thomas*, 516 U.S. 349, 359 (1996)).

330. See *Paglia v. Breskovich*, 522 P.2d 511, 514 (Wash. Ct. App. 1974).

331. See *MP Med.*, 213 P.3d at 936; *Paglia*, 522 P.2d at 514. It should be noted here that a court is also bound to faithfully apply the laws enacted by the legislature in the relevant jurisdiction and obey the mandates of courts of higher authority. *MP Med.*, 213 P.3d at 936 (“We are bound by the decisions of our state Supreme Court and err when we fail to follow them.”).

332. *Commerce Sav. Ass’n v. Welch*, 783 S.W.2d 668, 669 (Tex. App. 1989); *MP Med.*, 213 P.3d at 933; *Paglia*, 522 P.2d at 514–15 (Pearson, J., concurring). See *supra* notes 140–64 and accompanying text for further discussion.

333. See *MP Med.*, 213 P.3d at 936; *Paglia*, 522 P.2d at 515 (Pearson, J., concurring).

334. See YEAZELL, *supra* note 109, at 263 (“Over the past two decades, the ‘civil litigation rate’ has ranged between .05—one civil lawsuit filed per year per 20 persons—and .058—one suit per year for every 17 persons. In 2004 about 17 million lawsuits were filed.”). Professor Yeazell also noted significant variations in the average time needed to reach trial between jurisdictions. *Id.* at 265–66 (longest median disposition time was 861 days, while the shortest was 217 days).

335. *Id.* at 291. Professor Yeazell explains that expenses—such as “the courtroom, the judge, clerical staff, and bailiffs—are borne by society generally, paid for by taxes.” *Id.* He noted that in the early 1990s litigation cost taxpayers \$4000 per day, which would be equivalent to \$6400 per day in 2008. *Id.* This figure only includes the direct cost to the taxpayers, and does not account for the resources expended by the litigants—which, Professor Yeazell notes, are often substantial. *Id.*

against the judgment creditor.<sup>336</sup> Disposing of a case on the merits through a trial and subsequent appeal will almost certainly take more time than allowing a judgment creditor to obtain and dismiss a lawsuit at the outset of the litigation or before an appeal on the merits. This method is acceptable if the judgment debtor's claims are unlikely to succeed on the merits, but if the judgment debtor's claims are meritorious, society's interest in efficiency must be subordinated to society's interest in promoting justice.<sup>337</sup>

Ultimately, society's interest in providing a mechanism for the just resolution of disputes between all of its members, rich and poor, is its most important interest.<sup>338</sup> Unfortunately, no bright-line rule, whether allowing judgment creditors to execute on choses in action against themselves or completely barring that practice, can guarantee a just result in every case. Bright-line rules are inadequate because of the complex interests of the parties and society described above.<sup>339</sup> Thus, the courts must have a relatively free hand in deciding whether to allow a writ of execution to issue. An ideal rule would allow a court to consider the interests of the judgment debtor, the judgment creditor, and society, and then decide whether a writ of execution should issue based on the facts of the case before it.

*C. The Solution: A Practical Test for Courts to Determine Whether a Writ of Execution Should Issue*

Washington's discretionary approach leaves the decision of whether to allow a judgment creditor to execute on choses in action against itself to the discretion of the trial court.<sup>340</sup> This is preferable to Utah's bright-line rule allowing the tactic because the facts and circumstances will inevitably vary from case to case, and a flexible approach allows a court to attempt to accommodate the interests of all parties.<sup>341</sup>

If Washington's approach has any shortcoming, it is that the *Paglia* and *MP Medical* courts failed to give any real guidance as to the factors a trial

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336. It saves society, at the very least, the costs of a trial, and reduces the burden on backlogged courts. *See id.*

337. *See Paglia*, 522 P.2d at 515 (Pearson, C.J., concurring).

338. RHODE, *supra* note 314, at 3 ("A commitment to equal justice is central to the legitimacy of democratic processes.").

339. *See supra* notes 216–28 and accompanying text.

340. *MP Med. Inc. v. Redman*, 213 P.3d 931, 936 (Wash. Ct. App. 2009); *Paglia*, 522 P.2d at 514.

341. *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 703 (Utah 2002).

court should consider in making its decision.<sup>342</sup> The Washington approach should be expanded to give further guidance to the trial court as to how to proceed when faced with a judgment creditor seeking to execute on a chose in action against itself. Any test should account for the interests of the parties and society as described in the preceding sections. Based on the considerations the courts have relied on when deciding whether to allow a judgment creditor to execute on a chose in action against himself, the following factors should be considered.

First, courts should consider whether the judgment debtor has other assets apart from the chose in action that can be levied and sold at execution before reaching the chose in action.<sup>343</sup> If the judgment debtor has sufficient assets to pay the judgment or obtain a stay, the court should be more inclined to allow the writ to issue.<sup>344</sup> In such a situation, the fault for failing to pay the judgment or post bond lies entirely with the judgment debtor, and the balance shifts toward the judgment creditor.<sup>345</sup> However, if the judgment debtor has either tendered other assets to obtain a stay, or has no other assets apart from the choses in action, the court should be less inclined to allow the writ to issue against the choses in action.<sup>346</sup> In that situation, a judgment

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342. *MP Med.*, 213 P.3d at 936; *Paglia*, 522 P.2d at 514. In *Paglia*, the court merely stated that a trial court should exercise control over its own process if the interest of all the parties could be accommodated. *Paglia*, 522 P.2d at 513. *MP Medical* stated only that the court should exercise its power over its own process to prevent an unjust result. *MP Med.*, 213 P.3d at 936. Both cases left unstated the factors the trial court should consider in determining whether the parties' interests could be accommodated or what constitutes an unjust result.

343. This is essentially the reverse of the approach suggested by Judge Zimmerman in his concurring opinion in *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 213 (Utah 1999). Judge Zimmerman would have prohibited a lawyer from obtaining execution on choses in action for legal malpractice claims against himself "unless [those claims are] the only remaining asset[s] of the debtor." *Id.* However, this Comment's approach would apply to *all* choses in action. Moreover, a judgment debtor with enough property to satisfy the judgment or post sufficient bond to obtain a stay would *not* be protected. A judgment debtor with insufficient property to obtain a stay or satisfy the judgment would be able to seek protection from the court.

344. See *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1076 (10th Cir. 2010) (judgment debtor failed to argue inability to pay supersedeas undertaking or satisfy the judgment). In some instances, nonmonetary assets, such as real estate, may be accepted as security. See *Athridge v. Iglesias*, 464 F. Supp. 2d 19, 24–25 (D.D.C. 2006) (accepting real estate as security in lieu of a supersedeas undertaking). And, at least in federal court, "[i]n unusual circumstances . . . the district court in its discretion may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery." *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 760–61 (D.C. Cir. 1980).

345. See *RMA Ventures*, 576 F.3d at 1076.

346. See, e.g., *Paglia*, 522 P.2d at 512. In *Paglia*, the defendant judgment creditor obtained one judgment against the judgment debtor plaintiff and attempted to execute on the judgment debtor's choses in action. *Id.* The judgment debtor contested the writ, and the trial judge gave him fifteen days to raise the money to pay the judgment, costs, and interest. *Id.* The plaintiff returned to the court after obtaining a sufficient loan. *Id.* However, the judgment creditor had purchased another judgment against the judgment debtor, and the judgment debtor's resources were exhausted. *Id.* The court of appeals ultimately found that allowing the writ to issue produced an inequitable result. *Id.*

debtor's inability to forestall enforcement of the judgment does not arise out of any failure to take advantage of procedural options.<sup>347</sup> When the judgment debtor has taken all measures to forestall execution of the judgment and protect her choses in action, the court should be inclined to aid her.<sup>348</sup>

Second, the courts should consider whether the judgment to be satisfied by execution on the chose in action was acquired by the judgment creditor through litigation against the judgment debtor, or whether it merely acquired it by purchasing the judgment from some third party after the judgment debtor filed suit against it.<sup>349</sup> This consideration accounts for the motivations of the judgment creditor.<sup>350</sup> A judgment creditor who has obtained a judgment for harm done to him personally has a better justification for executing on the judgment debtor's choses in action than one who purchased a third party's judgment against the judgment debtor to avoid litigating the judgment debtor's claims on the merits.<sup>351</sup> Of course, this is something of a fiction because in either case the judgment creditor will be motivated to execute on the judgment debtor's cause of action in order to avoid further litigation. However, the active purchase of an unsatisfied judgment for the sole purpose of using the execution process to avoid being forced to defend a suit in court "borders on abuse of legal process" and should not be condoned.<sup>352</sup>

Third, the courts should consider whether the judgment debtor is likely to succeed on the merits of his claim.<sup>353</sup> This factor will help to alleviate

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at 514. Presumably, the plaintiff's good faith effort to raise the money necessary to pay the judgment influenced this decision.

347. See *supra* note 346.

348. *Id.*

349. Compare *Applied Med. Techs., Inc. v. Eames*, 44 P.3d 699, 700 (Utah 2002) (judgment creditor prevailed in an action to foreclose on a deed of trust against judgment debtor), and *Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1007 (Miss. 2006) (bank prevailed on counterclaims against judgment debtor), with *Paglia*, 522 P.2d at 512 (judgment creditor purchased claims against judgment debtor from a third party).

350. As distinguished from the first factor, which attempts to account for the motivations and actions of the judgment debtor, i.e., whether the judgment debtor has done all he can to forestall execution on his choses in action. See *supra* note 343 and accompanying text.

351. Indeed, this is the root cause of Chief Judge Pearson's concerns over the skewed incentives that Utah's rule fosters. *Paglia*, 522 P.2d at 515 (Pearson, J., concurring); see also *Amphibious Partners LLC v. Redman*, 389 F. App'x 762, 767 (10th Cir. 2010); *RMA Ventures*, 576 F.3d at 1076–77.

352. *Paglia*, 522 P.2d at 515 (Pearson, C.J., concurring).

353. At first glance, it may appear that this inquiry violates the plaintiff's right to a jury trial on the claims subject to execution. However, this right could be said to be attached to the claim itself, just as Utah holds that the right of access to the state's courts is attached to the underlying claim.

three concerns: (1) that the judgment debtor will not receive fair value for his chose in action at the execution sale;<sup>354</sup> (2) that the judgment creditor will lose the value of the choses in action through the judgment debtor's exhaustion of those rights;<sup>355</sup> and (3) that there will be an incentive for judgment creditors facing substantial and reasonably certain liability to frustrate the judgment debtor's legitimate claims through execution on them.<sup>356</sup> As noted earlier, it is highly likely that a judgment creditor will be the only bidder at a sale, and he may be able to purchase claims against himself at a substantial discount.<sup>357</sup> If those claims are likely to be successful, he will receive a substantial windfall by avoiding liability and the cost of defending against those claims.<sup>358</sup> A preliminary consideration of the merits of the claim reduces this possibility. It also hedges against the possibility that the judgment debtor will exhaust the claims through litigating them, as a judgment debtor that succeeds in his claim will realize some value and the judgment creditor will receive an offset in the amount of his judgment.<sup>359</sup> Finally, consideration of this factor destroys the incentive structure that Judge Lucero was so concerned about.<sup>360</sup> A judgment creditor

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*See Applied Med.*, 44 P.3d at 702–03. If this right is attached to the claim, rather than the individual, the right to a jury trial will not be violated because transfer of the claim to the judgment creditor will result in transfer of the right. *See id.* A person has no right to a jury trial for claims he does not own. Thus, the right to a jury trial should present no problem to a judgment creditor in a state that holds that a judgment creditor's purchase of claims against himself does not violate the open courts clause because the court is likely to hold that such actions do not violate the right to a jury trial. A court that holds that a judgment creditor's execution and purchase of claims against itself violates the open courts clause will necessarily bar judgment creditors from executing on choses in action against themselves, and the issue will be moot.

Moreover, a determination of the likelihood of success on the merits is one the courts often make in other contexts, such as when considering whether to grant a preliminary injunction. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits . . .”). Some courts may also grant discretionary stays of execution, and one of the common factors they consider is the likelihood of success on the merits for the party seeking the stay. 5 AM. JUR. 2D *Appellate Review* § 405 (2007). The relief the court would grant in this situation would have the same effect as a stay, at least as to the choses in action; however, a court's denial of the motion to quash a writ of execution would destroy the plaintiff's right to have his case heard on the merits, thus raising the concerns regarding the right to a jury trial.

354. *See supra* notes 262–75 and accompanying text.

355. *See supra* notes 302–04, 308–15 and accompanying text.

356. *See supra* notes 250–57 and accompanying text.

357. *Amphibious Partners LLC v. Redman*, 389 F. App'x 762, 767–68 (10th Cir. 2010); *Marantha Faith Ctr., Inc. v. Colonial Trust Co.*, 904 So. 2d 1004, 1009 (Miss. 2006).

358. *Amphibious Partners*, 389 F. App'x at 767–68.

359. *See Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303, 305 (Iowa 1994); *see also Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 761 (Tex. App. 1992) (“[Judgment creditor] admits that he will have a right of offset in the event that [judgment debtor] obtains a judgment against him . . .”).

360. *Amphibious Partners*, 389 F. App'x at 767–68; *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1077 (10th Cir. 2009) (Lucero, J., concurring) (noting that allowing defendants

faced with strong claims by the judgment debtor has a strong incentive to avoid liability by executing on the judgment debtor's chose in action against the judgment creditor.<sup>361</sup> However, if courts show a preference for allowing strong claims to be heard on the merits, judgment creditors will be much less likely to obtain a writ of execution and thus avoid liability. Consideration of this factor mitigates against three of the most compelling concerns that a judgment creditor's execution on claims against himself raises. Therefore, it is probably the most important consideration of the four.

The fourth and final factor that the courts should consider is whether the underlying judgment is currently pending appeal.<sup>362</sup> A judgment from which no appeal has been taken and the time for filing a notice of appeal has expired is conclusive, while one that is currently pending appellate review is subject to reversal.<sup>363</sup> Of course, in most states a writ of execution may issue even while the underlying judgment is pending appellate review, and the judgment debtor may be entitled to restitution if he obtains a reversal.<sup>364</sup> However, no such remedy will be available to a judgment debtor who has lost his right to pursue the appeal through a writ of execution, and courts appear to recognize the injustice of allowing a judgment creditor to extinguish the judgment debtor's right to pursue an appeal in that way.<sup>365</sup> Thus, consideration of this factor will help mitigate this concern.

Of these four factors, no single one is dispositive. Rather, they are only meant to provide a court with a framework to determine whether the issuance of a writ of execution would be appropriate in a given situation.<sup>366</sup> In this way, the application of the test described above will enable courts to further the interests of society.<sup>367</sup> It promotes a just result by allowing a trial

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to execute on claims against themselves incentivizes defendants "to attempt an end run around merits determinations").

361. *RMA Ventures*, 576 F.3d at 1077.

362. *See id.* at 1076.

363. *See supra* notes 287–92 and accompanying text.

364. *NEEDHAM & POLLACK*, *supra* note 38, § 11.8; *see also* *Athridge v. Iglesias*, 464 F. Supp. 2d 19, 23 (D.D.C. 2006) (noting that "if the [judgment debtors] are successful on appeal, the transfer of choses would have been premature and require additional steps to undo what had been done"); *id.* at 23–25.

365. *RMA Ventures*, 576 F.3d at 1076 (recognizing the "degree of discomfort" presented when a judgment creditor executes on an appeal to satisfy the same judgment from which the appeal was taken); *MP Med. Inc. v. Wegman*, 213 P.3d 931, 936 (Wash. Ct. App. 2009) ("While MP Medical has no constitutional right to appeal in this case, allowing one party to destroy the opposing party's appeal by becoming its owner through enforcement of the very judgment under review is fundamentally unjust.").

366. *See Paglia v. Breskovich*, 522 P.2d 511, 513 (Wash. Ct. App. 1974).

367. *See supra* notes 321–37 and accompanying text.



court to apply its knowledge of the facts of each case and to decide on a course of action by weighing the interests of both parties. At the same time, it promotes efficiency, as cases that lack merit will be more likely to be subject to execution, sale to a judgment creditor, and dismissal. Finally, it promotes a proper incentive structure in which judgment creditors are not allowed to escape meritorious claims by taking advantage of the fact that the judgment debtor cannot afford to pay a judgment.

## V. THE PROPOSED BALANCING TEST IN APPLICATION AND POTENTIAL BARRIERS TO IMPLEMENTATION

### A. *A Return to the Scenario Described in Part I*

To illustrate the potential consequences of a bright-line rule and the application of the test proposed in the preceding Part, it may be helpful to return to the hypothetical situation discussed in the Introduction to this Comment, with a few additional facts.<sup>368</sup> To review, plaintiff is injured in a car accident in which a delivery truck driver negligently collides with the plaintiff while making deliveries for his employer.<sup>369</sup> Plaintiff has convincing evidence of the driver's negligence. However, the plaintiff is liable for an outstanding judgment for a breach of contract claim in the amount of \$50,000 and has no other significant assets.<sup>370</sup> The plaintiff sues both the truck driver and his employer, a shipping company, for \$500,000 for personal injuries. The employer purchases the judgment from the original judgment creditor for \$10,000, executes on the plaintiff's claims against *both* the employer and the driver, then purchases those claims for \$10,000 total.<sup>371</sup> The claims are extinguished when the judgment creditor substitutes itself as plaintiff and dismisses them both. The judgment creditor

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368. *See supra* Part I.

369. This would give rise to an unliquidated tort claim for damages for pain and suffering, medical expenses, lost wages, and so forth. This hypothetical is intended to be a variation on the one proposed by Chief Judge Pearson in his concurring opinion in *Paglia*. 522 P.2d at 515.

370. This is essentially the same situation the judgment debtor found himself in in *Paglia*, except that the judgment debtor in that case had three outstanding judgments against him totaling \$20,000. *Id.* at 512.

371. Defendant's purchase of two claims, instead of one, is meant to highlight the fact that codefendants conceivably could cooperate to extinguish multiple claims of the judgment debtor. *Cf.* *FM. Indus., Inc. v. Citicorp Credit Serv., Inc.*, 656 F. Supp. 2d 795, 796 (N.D. Ill. 2009) (noting that the judgment creditor explicitly excluded the judgment debtor's claims against its codefendant). However, this may require a fairly high level of trust between codefendant A and codefendant B because once the claims against codefendant A are purchased by codefendant B, codefendant B could simply turn on codefendant A and assert the plaintiff's claim.

has eliminated a \$500,000 claim for a mere \$20,000,<sup>372</sup> and it still has the right to collect the \$40,000 remaining on the judgment.<sup>373</sup>

Suppose further that shortly after the plaintiff's suit is dismissed, the unfortunate plaintiff undergoes surgery for his injuries and the doctor negligently injures him while on the operating table.<sup>374</sup> The plaintiff's injuries are aggravated, and he sues the doctor for malpractice, alleging damages of \$150,000. The doctor, having heard the plaintiff's story during a consultation before the surgery, contacts the shipping company and offers to purchase the judgment for \$10,000.<sup>375</sup> The shipping company, seeing an opportunity to recoup part of its expenditures in the previous litigation, obliges, and the doctor obtains the right to collect the \$40,000 deficiency judgment. The doctor then repeats the process, executing on the plaintiff's malpractice claim, purchasing it for \$10,000, substituting herself as plaintiff, and dismissing the claim. Not only has the plaintiff now lost both of his negligence claims and his malpractice claim, but he is still liable for a \$30,000 deficiency judgment. Thus, the process could be repeated any time the plaintiff brings an action in court until the judgment is satisfied. In other words, in a state that adopts a bright-line rule allowing a judgment creditor to execute on choses in action against itself, a plaintiff may essentially be barred by his judgment creditors from court until the judgment is satisfied or he declares bankruptcy.<sup>376</sup>

In a state like Utah that allows judgment creditors to execute on causes of action against themselves, a case like this could occur. Granted, this is an extreme example, which no courts have encountered. However, if it ever arises, under current Utah law a trial court could do nothing to prevent events from unfolding as in the hypothetical situation described above.<sup>377</sup> The purpose of execution is to allow a court to aid a judgment creditor in collecting his judgment, not to provide a procedural tool for a judgment creditor to render himself immune from suit.<sup>378</sup> Use of the procedural tool of execution as a shield against liability is a perversion of the purpose behind the law of execution because it grants the judgment creditor a right beyond

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372. This equals the cost of purchasing the judgment plus the cost of purchasing the claims.

373. See *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 212 (Utah 1999).

374. Apparently, this two-step process has never occurred. However, it is entirely conceivable that such a situation could arise.

375. See *Paglia*, 522 P.2d at 512.

376. See *Tanasse*, 980 P.2d at 213 (Zimmerman, J., concurring and dissenting).

377. It would be bound by the higher court's decisions.

378. *Peacock v. Thomas*, 516 U.S. 349, 359 (1996).

the mere right to recover the value of the judgment and “outrage[s] the right of a judgment debtor.”<sup>379</sup> Therefore it is undesirable.

In a state that applies Washington’s rule along with the test proposed by this Comment, a court would have the power to prevent such a result.<sup>380</sup> Applying the factors, the court would have found that the plaintiff did not have other assets with which to satisfy the judgment apart from the chose in action,<sup>381</sup> which would favor allowing the writ to issue.<sup>382</sup> However, the court would also have found that the judgment creditor purchased the judgment from a third party, evidencing an intent to execute on the judgment not to satisfy it,<sup>383</sup> but to obtain and extinguish the plaintiff’s claims. Upon further examination of the facts of the plaintiff’s case, the court would find that the plaintiff has presented a strong claim for damages against the delivery driver and his employer and is likely to succeed on the merits.<sup>384</sup> Thus, the plaintiff would probably be entitled to recover damages, and the defendant who holds the judgment would be entitled to an offset of \$50,000 if the plaintiff’s claim succeeds. All of these factors would cut against allowing the writ of execution to issue. Finally, the court would consider whether the judgment in the original breach of contract case was pending appeal.<sup>385</sup> It is not, so this factor would cut in favor of allowing the writ to issue.

On balance, if the test is properly applied, the defendant’s purpose in purchasing the claims—to obtain both sides of the lawsuit and extinguish the claims to avoid liability—coupled with the fact that the plaintiff is likely to succeed on the merits, would be of significant weight. They would be weighed against the fact that the claim may be exhausted of all value if the plaintiff’s claim ultimately fails in addition to the fact that the judgment on which execution would be based was entirely conclusive. However, in this situation, because the plaintiff is likely to succeed on the merits and defendant would be entitled to an offset, the danger that the value of plaintiff’s claim will be exhausted is reduced.<sup>386</sup> Further, the conclusiveness of the judgment in this situation does not outweigh the injustice of forbidding a plaintiff from litigating meritorious claims. Accordingly, the

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379. *Paglia*, 522 P.2d at 514 (quoting *Triplett v. Bergman*, 642 P. 899, 900 (Wash. 1914)).

380. Again, Washington courts have the inherent power to ensure that their own process is not used to procure an inequitable result. *Id.*

381. *See supra* notes 342–65 and accompanying text.

382. *See supra* notes 342–44 and accompanying text. After all, the plaintiff *has* no assets, and the judgment creditor’s recovery would be at risk if the plaintiff were allowed to proceed because the plaintiff could possibly exhaust the claim. *See Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303, 305 (Iowa 1994).

383. *See supra* notes 347–50 and accompanying text.

384. *See supra* notes 351–60 and accompanying text.

385. *See supra* notes 361–63 and accompanying text.

386. *Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 761 (Tex. App. 1992).

court would deny the writ of execution and the plaintiff would be allowed to pursue his cause of action.<sup>387</sup>

This approach has many benefits. In a situation such as the one described above, it allows the court to protect the interests of the judgment debtor and the judgment creditor alike.<sup>388</sup> The judgment debtor is allowed to pursue his claims, and if the claims are successful, the judgment creditor will have the amount of his liability for the plaintiff's injuries reduced by the amount of the outstanding judgment.<sup>389</sup> Moreover, no party has been denied access to the courts.<sup>390</sup> In sum, the application of this test provides a result that is "just in both appearance and fact," and allows the courts to fulfill their duty to provide fair and equal treatment in the resolution of disputes.<sup>391</sup>

### B. Potential Barriers to Implementation

While the Washington approach coupled with the four factors above is preferable to an approach that allows judgment creditors to execute on choses in action against themselves regardless of the circumstances, there may be some barriers to implementing this plan that are beyond the control of the courts. In particular, a barrier could arise in the language of state execution statutes and the manner in which that state's courts have interpreted it.<sup>392</sup> The authorities suggest that the balancing test proposed by

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387. The doctor's attempt to execute on the plaintiff's claims would be subjected to a similar analysis if she is able to obtain a judgment over the plaintiff. However, if the plaintiff does prevail and the judgment is paid through an offset for the shipping company, there will be no deficiency judgment for the doctor to obtain.

388. This was a key requirement laid down in *Paglia v. Breskovich* that is easy to overlook in the text of the opinion. 522 P.2d 511, 513–14 (Wash. Ct. App. 1974).

389. Of course, if the judgment debtor's claim fails, the judgment creditor has no property against which to execute. *Chrysler Credit Corp. v. Rosenberger*, 512 N.W.2d 303, 305 (Iowa 1994). However, in the case of a judgment debtor with no assets apart from the choses in action, he recovers as much as he would have had the plaintiff never brought suit: nothing. There may be substantial cost incurred by defending the case though. *See id.* Moreover, the judgment creditor could use the threat of an attempt to execute as a bargaining tool in settlement negotiations. This is the reason that the likelihood of success on the merits is such an important consideration.

390. *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306–07 (Tex. App. 1992).

391. *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 212 (Utah 1999).

392. *See Citizens Nat'l Bank v. Dixieland Forest Prods., LLC*, 935 So. 2d 1004, 1010 (Miss. 2006) ("[T]he clerks of all courts of law or equity . . . shall, at the request and cost of the owner of the judgment or decree or his attorney, issue executions on all judgments and decrees rendered therein . . . ." (quoting MISS. CODE ANN. § 13-3-111 (2011))); *Tanasse*, 980 P.2d at 210–11 ("We . . . hold that our writ of execution rules are quite broad and, *absent legislative proscription*, encompass unliquidated tort claims, including legal negligence actions." (emphasis added)).

this Comment is equitable in nature.<sup>393</sup> When a statute controls an issue before a court, equity must give way, and the court is bound to faithfully apply the controlling statute.<sup>394</sup> A state with a statutory regime that divests the courts of all control over whether a writ of execution should issue presents a significant barrier to judicial adoption of such a test. In states with such statutes, legislation should be enacted to give courts discretion over whether to allow a judgment creditor to execute on choses in action against itself. No vast statutory overhaul is necessary. A simple statute that codifies the test above and vests power with the courts to deny a writ of execution to a judgment creditor on choses in action against itself should be sufficient.

## VI. CONCLUSION

States that allow execution on choses in action will have to decide whether to allow judgment creditors to extinguish a claim against themselves through a writ of execution. Of course, the judgment creditor has a right to apply the judgment debtor's property in order to satisfy a judgment entered according to due process of law. However, a bright-line rule allowing a judgment creditor to execute on choses in action against himself ignores the legitimate interests of the judgment debtor. Conversely, a bright-line rule prohibiting a judgment creditor from executing on choses in action against itself ignores the legitimate interests of the judgment creditor. Thus, a bright-line rule, whether allowing or prohibiting the tactic, can never properly balance these competing interests.

Consequently, Washington's discretionary approach is preferable because it allows a court to exercise control over its own process to prevent the inequitable result of a judgment creditor obtaining control of both sides of a lawsuit if the interests of all concerned parties can be accommodated. However, courts need a structured approach to decide whether a writ of execution should issue that effectively balances those interests. Therefore, courts should consider (1) whether the judgment debtor has other assets apart from the chose in action that can be levied and sold at execution; (2)

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393. See *Heritage Corp. of S. Fla. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. 01-003519-CIV, 2008 WL 4858244, at \*4 (S.D. Fla. Nov. 10, 2008); *Donan v. Dolce Vita Sa, Inc.*, 992 So. 2d 859, 861 (Fla. Dist. Ct. App. 2008); *Brenton Bros. v. Dorr*, 239 N.W. 808, 810 (Iowa 1931); *MP Med. Inc. v. Wegman*, 213 P.3d 931, 936 (Wash. Ct. App. 2009); *Paglia*, 522 P.2d at 512–13.

394. *First Bank v. H.R. Buckman, C.L.U. & Assocs., Inc.*, No. 83-444, 1983 WL 162396, at \*1 (Wis. Ct. App. 1983) (per curiam) (“The general rule is that equity follows the statutes and the circuit court is bound to apply the provisions of a statute which controls the issue before it.”); *McPadden v. Morris*, 13 A.2d 679, 680 (Conn. 1940) (“[A] court is powerless to add to the wording of a statute which is clear and direct. It cannot seek out what it may conceive to be the equities of each particular case and ignore specific provisions of a law which clearly controls them.”). However, whether a court's equitable powers to manage its own process and prevent injustice are limited by a state's broad execution statute is a matter of statutory interpretation.

whether the judgment creditor acquired the judgment to be satisfied through litigation against the judgment debtor or from a third party; (3) whether the judgment debtor is likely to succeed on the merits of his claim; and (4) whether the judgment to be satisfied is currently pending appeal.

In sum, execution is meant to be a tool to aid judgment creditors in obtaining satisfaction of their judgments, and nothing more. Jurisdictions that allow judgment creditors to execute on choses in action against themselves enable those judgment creditors to use the execution statute to gain far more than mere satisfaction of their judgment. Judgment creditors in those states gain, in essence, the right to avoid being brought into court to defend against the judgment debtor's claim. Conversely, the judgment debtor loses his right to redress for injury at the hands of the judgment creditor. Such a policy is inconsistent with the goals of execution and is therefore undesirable. The approach proposed by this Comment protects against this sort of abuse and gives courts the power to ensure that disputes between parties are resolved in a fair and efficient manner.

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